Petition

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID R. WILLIAMS d/b/a
INDUSTRIAL COMMUNICATIONS,
Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF WYOMING
and COMMERCIAL COMMUNICATIONS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

WALTER P. FABER, JR. and
MICHAEL A. NEIDER, of
WATKINS & FABER
2102 East 3300 South
Salt Lake City, UT 84109
Telephone: (801) 486-5634

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Wyoming Supreme Court erred in affirming the order of the Public Service Commission of Wyoming which allocated the use of certain national radio common carrier frequencies to a particular Wyoming radio common carrier even though allocation of such frequencies is in the exclusive jurisdiction of the Federal Communications Commission.

2. Whether the Wyoming Supreme Court erred in affirming the order of the Wyoming commission which required Petitioner under the threat of being decertified to obtain or relinquish particular radio frequencies within a limited period of time even though application for use of such frequencies was pending before the FCC, and Petitioner had no power to comply with the order without abandoning its federal rights and withdrawing its FCC application.

3. Whether the Wyoming Supreme Court erred in affirming the order of the Wyoming commission which limited Petitioner's radio service area in regard to particular radio frequencies even though such service areas are exclusively determined and controlled by the FCC.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Wyoming Supreme Court entered in the above entitled case on April 10, 1981.

OPINION BELOW

The opinion of the Wyoming Supreme Court, and the Order Denying Rehearing appear in Appendix A to this Petition. The Memorandum Opinion and Order, and the Order Denying Petition for Rehearing of the Public Service Commission of Wyoming appear in Appendix B.

JURISDICTION

The Decision of the Wyoming Supreme Court was filed on April 10, 1981. A timely Petition for Rehearing was denied on May 12, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the Interstate Commerce Clause, art. 1, § 8, Clause 3, and the Supremacy Clause, art. VI, Clause 2. The federal statute applicable to this case is the Communications Act of 1934, 47 U.S.C. § 301. All of the above appear in Appendix C.

STATEMENT OF THE CASE

Petitioner has been operating from a base in Utah under authority from the FCC a radio common carrier (RCC) business in the southwest area of Wyoming since approximately 1969 and has been furnishing mobile radio service to oil field customers in that area to the present time. In 1977 the Public Service Commission of Wyoming first asserted jurisdiction over RCC's in southwestern Wyoming and then granted certificates of convenience and necessity to Petitioner and Commercial Communications, Inc. The basis of the commission's order and the grant of certificates was a 1977 stipulation approved in open commission hearing between the parties which stipulation recited that Petititioner had previously filed with the FCC an application for use of VHF frequencies 1 and 9 in Evanston, Wyoming. The 1977 order and stipulation appear in Appendix D.

A year later Commercial claimed that Petitioner had used business duress in negotiating the 1977 stipulation. After hearing the matter in 1979, the commission found no duress but awarded Commercial use of VHF frequencies 1 and 9 in Evanston notwithstanding the 1977 stipulation and order. The commission's 1979 order on page B-13 thereof states that—

> [C]ommercial should be entitled to operate on VHF Channels 1 and 9 in the Rock Springs, Green River, Evanston and LaBarge areas.... The aforementioned Channel allocations are the re-

> sult of the Commission's determination as to what Channels would be acceptable to this Commission in furtherance of the public interest each utility is required to serve.

The commission's 1979 order also defined radio service areas and stated that state operating authority would be revoked if its order was not obeyed within six months. If Petitioner were to comply with the 1979 commission order Petitioner would have to abandon and withdraw its FCC application for frequencies 1 and 9 which application has been pending before the FCC since August, 1977.

The Wyoming Supreme Court upheld the commission's 1979 order on the grounds that the commission had the authority to issue conditional certificates and that there was no federal preemption of FCC frequency allocation and regulation. The Wyoming Supreme Court also stated that the commission only did what Petitioner had asked it to do. That conclusion is based on a reading of selected excerpts taken out of context from Petitioner's 1979 brief to the commission. The Wyoming Supreme Court quoted extensively from Petitioner's brief to the commission but neglected to acknowledge the following statements on page E-13 of said brief:

> Industrial believes that the best solution under all the circumstances of this case would be to implement the contract drawn up by Jeremiah Courtney in February, 1978, for the signatures of Commercial and Industrial. This would achieve interference free service to the public in southwestern Wyoming and would allow both parties to extend their service, if required, into the UHF range, inasmuch as all VHF channels are presently in service in the area.

The full text of Petitioner's 1979 brief to the Wyoming

Public Service Commission appears in Appendix E. Petitioner never suggested that the Wyoming commission had any independent power in regard to frequency allocation or regulations, but *only* that the commission could enforce a 1978 agreement between Commercial and Petitioner in which agreement the parties had committed themselves to the use of particular frequencies to avoid interference with each other. In that regard there have been two agreements between Commercial and Petitioner which have come before the commission, i.e., the 1977 stipulation and a subsequent agreement made in 1978.

In the 1979 commission hearing, Petitioner stated that one possible way to end the conflict between Petitioner and Commercial would be for the commission to require the parties to abide by the terms of their 1978 agreement if the commission decided not to enforce the 1977 stipulation and order. If the commission had required the parties to honor their 1978 agreement, then Petitioner would as a term of that agreement have given up its application for frequencies 1 and 9. Because the commission did not even purport to enforce the 1978 agreement, there was no other jurisdictional basis for the commission to order Petitioner to give up its FCC application for frequencies 1 and 9. The Wyoming Supreme Court then affirmed the commission's 1979 order by quoting only a part of Petitioner's 1979 proposal and treating that part of the proposal as unconditional even though the full proposal is unquestionably limited and was made solely upon the basis that there would be full enforcement of the 1978 agreement between Petitioner and Commercial. The problem was then multiplied by the Wyoming Supreme Court's further holding that the allocation of RCC frequencies has not been federally preempted even though such holding is contrary to decisions of this Court and to explicit provision of federal statute.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES WYOMING DECISIONS CONFLICTING WITH FEDERAL PREEMPTION OF RCC RADIO FREQUENCY ALLOCATION AND USE, AS SUCH PREEMPTION HAS BEEN ESTABLISHED BY FEDERAL STATUTE AND DECISIONS OF THIS COURT.

By affirming the 1979 order of the Public Service Commission of Wyoming, the Supreme Court of Wyoming directly held that the commission had power to grant to a particular and competing RCC the use of particular national radio frequencies even though the Commission's only justification for achieving such a result, even incidentally, would have been the explicit enforcement of the 1978 agreement between Petitioner and Commercial. Because the Wyoming commission did not even purport to enforce the 1978 agreement, there was no other jurisdictional basis for directly allocating RCC frequencies 1 and 9 to Commercial. The Wyoming Supreme Court's holding is directly contrary to this Court's decision that 47 U.S.C. § 301 provides that allocation of RCC radio frequencies has been preempted to the FCC.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L.Ed 2d 983, 83 S.Ct. 1759 (1963), this Court stated in footnote 6 to the decision that in regard to "...the Commission's (FCC) jurisdiction over technical matters such as a frequency allocation... federal control is clearly exclusive. 47 U.S.C. 301." If the Wyoming Supreme Court's decision is not reversed, then it would advance the proposition that allocation of national radio frequencies and technical regulation thereof may be made by state agencies regardless of federal preemption under the above statute and decision of this Court.

II. THE DECISION OF THE WYOMING SUPREME COURT WRONGLY DEPRIVES PETITIONER OF SUBSTANTIAL FEDERAL RIGHTS.

Petitioner filed with the FCC in 1977 an application for the use of RCC frequencies 1 and 9 in Evanston, Wyoming. Petitioner's application was acknowledged in the 1977 stipulation and the 1977 order of the Public Service Commission of Wyoming. That application is still pending before the FCC. The 1979 order of the Wyoming commission allocates frequencies 1 and 9 to Commercial and requires Petitioner to comply with its order within six months. The thrust of the commission's order is to require Petitioner to abandon and withdraw its FCC application for frequencies 1 and 9 under threat of Wyoming's withdrawal of Petitioner's state certificate of authority.

Petitioner has no control over the pace of process before the FCC and even if it had it would be grossly unfair for Wyoming to be able to require Petitioner to abandon its federal rights. Moreover, the decision of the Wyoming Supreme Court places Wyoming state authority above and in direct conflict with exclusive federal process. If the Wyoming decision is allowed to stand it would deprive Petitioner of a clear and exclusive federal right as well as encourage the Wyoming commission to disregard established federal jurisdiction.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays that a Writ of Certiorari should issue to review the decision of the Wyoming Supreme Court affirming the 1979 Memorandum Opinion and Order of the Public Service Commission of Wyoming.

Respectfully submitted,
Walter P. Faber, Jr.
Michael A. Neider, of
WATKINS & FABER
2102 East 3300 South
Salt Lake City, UT 84109
Telephone: (801) 486-5634
Attorneys for Petitioner

August 5, 1981

APPENDIX A

IN THE MATTER OF THE APPEAL OF DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS FROM A DECISION OF THE WYOMING PUBLIC SERVICE COMMISSION IN DOCKET NO. 9661, SUB 1 DATED MAY 18, 1979, AS ALTERED BY ITS DECISION DATED AUGUST 29, 1979.

DAVID R. WILLIAMS, d/b/a INDUSTRIAL COMMUNICATIONS, APELLANT

(Petitioner)

v.

PUBLIC SERVICE COMMISSION OF WYOMING AND COMMERCIAL COMMUNICATIONS, INC. APPELLEES

(Respondents)

NO. 5410

SUPREME COURT OF WYOMING.

April 10, 1981

626 P.2d 564

Michael A. Neider, Salt Lake City, Utah (argued) specially admitted for purposes of this case, and Walter P. Faber, Jr., Salt Lake City, Utah, and Ward White of Guy, Williams & White, Cheyenne, for appellant.

John D. Troughton, Atty. Gen., Thomas J. Carroll, III, Senior Asst. Atty. Gen., Steven R. Shanahan, Lawrence J. Wolfe, Asst. Attys. Gen., Cheyenne, for appellee Public Service Commission.

David H. Carmichael (argued) of Carmichael, McNiff & Patton, Cheyenne, for appellee Commercial Communications, Inc.

Before ROSE, C.J., and McCLINTOCK*, RAPER, THOMAS and ROONEY, JJ.

RAPER, Justice.

From an order of the district court affirming an order of the Public Service Commission (PSC), David R. Williams, d/b/a Industrial Communications (appellant) feels aggrieved and appeals. Several issues are presented. Their focus is upon the PSC's authority to regulate radio common carriers.[1] Apellant states the questions raised as follows:

"1. Whether the Commission exceeded its authority in attempting to allocate common carrier two-way radio telephone channels when the allocation and granting of such channels is in the exclusive jurisdiction of the Federal Communications Commission (FCC).

"2. Whether the Commission exceeded its authority by requiring the parties to obtain or relinquish radio channels and otherwise comply within a certain period of time because the parties have no control over the FCC which has exclusive jurisdiction of such matters.

"3. Whether the Commission exceeded its authority in attempting to limit Industrial Communication's radio service area when the grant of any common carrier radio service area is in the exclusive jurisdiction of the FCC.

"4. Whether the Commission without a basis in fact or law arbitrarily and capriciously reduced Industrial Communication's service area granted in 1977."

Appellee, Commercial Communications, Inc. (Commer-

cial), views the case more simply as asking:

"A. Whether the regulatory action taken by the Wyoming Public Service Commission, in the instant case, is prohibited because of the doctrine of 'federal preemption'?

"B. Whether the Wyoming Public Service Commission exceeded its statutory authority in modifying previously issues Certificates of Convenience and Necessity, in the instant case, by attaching certain conditions to those Certificates and, if so, may the Petitioner, David R. Williams d/b/a Industrial Communications, successfully assert reversible error at this point in the proceedings?"

We will affirm the district court.

In January of 1977 Commercial filed its application with the PSC for authority to commence radio telephone service to the cities of Rawlins and Evanston in southwestern Wyoming. This was done pursuant to § 37-2-205(a), W.S. 1977, which provides:

> "(a) No public utility shall begin construction of a line, plant or system, or of any extension of a line, plant or system without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. This act shall not be construed to require any public utility to secure a certificate for an extension within any city or town within which it has lawfully commenced operation, or for an extension into territory contiguous to its line, plant or system for which no certificate is in force and is not served by a public utility of like character or for any extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its

> line, plant or system interferes or is about to interfere with the operation of the line, plant or system of any other public utility already authorized or constructed, the commission on complaint of the public utility claiming to be injuriously affected, may after hearing make such order and prescribe the terms and conditions for the location of the lines, plants or systems affected, as to it are just and reasonable. The power companies may, without the certificate, increase capacity of existing plants."[2]

Various parties, including appellant, filed protests and sought to intervene in the proceedings conducted by the PSC upon such an application.

Appellant filed its own application for a certificate of convenience and necessity in February of 1977. In it, authority was sought to provide radio telephone service to all or parts of the southwestern Wyoming Counties of Lincoln, Uinta, and Sweetwater. Protests were filed by various parties including Commercial, and leave to intervene was requested.

On August 22, 1977, appellant petitioned for leave to amend its application in order to include Sublette and Carbon Counties. As later found by the PSC:

> "... The Commission denied the petition in an order dated August 25, 1977, but in response to a motion made by Industrial in the pre-hearing conference held August 29, 1977, the Commission allowed Industrial to present evidence pertaining to Sublette and Carbon County."

All matters were consolidated for hearing by the PSC. On August 29, 1977, a pre-hearing conference began. During this conference settlement negotiations were carried out by

the parties. As a result a stipulation was agreed to. This agreement was dated September 1, 1977, and was incorporated by reference into the order issued by the PSC on November 29, 1977, which provided in pertinent part:

> "2) Each of the above applicants agrees and stipulates that each shall and does hereby withdraw as a protestant and/or intervenor, as the case may be, in and to the application and requested amendments of each of the others in the respective Docket No. and case, and further agrees and stipulates that each could have and is hereby considered as having furnished sufficient evidence to justify and warrant the complete granting of the respective application and requested amendments thereto by the Wyoming Public Service Commission, except as specifically limited herein.
>
> * * * * *
>
> "9) Each of the above applicants agrees and stipulates that the application and requested amendments of each as stated above should be granted under the following terms and conditions:
>
> * * * * *
>
> "(d) Commercial Communications, Inc. and David R. Williams will jointly apply to the FCC for a construction permit and license for VHF channel 7 (frequency 152.120 MHz) for Carbon County, Wyo. and shall share equally in the cost of obtaining and installing said channel, operating said channel and the use of said channel. Neither Commercial nor Williams shall use said channel during any period so as to prevent the use by the other of one-half of the channel time during such period. None of the

other applicants shall protest Commercial's and Williams' application to the FCC for said channel.

"(e) Commercial and Williams shall within three weeks from the date hereof arrange to meet in Evanston, Wyoming to study and determine if any interference will occur to either because of the use of VHF channels 1 and 9 in that area. If it is determined that undue inference will occur, Commercial and Williams agree to work out a solution and agree that any such interference will be deemed to be caused equally by the operations of both and shall be equally the responsibility of both. This shall not be construed to require a change in effective radiated power or antenna direction of any presently existing transmitters.

"(f) Each applicant shall receive authority as requested in each individual application and requested amendments thereto except as limited in this stipulation."

On August 2, 1978, Commercial filed a complaint and petitioned for cancellation of appellant's certification of public convenience and necessity. It alleged that appellant was blocking and obstructing Commercial's efforts to commence service in Rawlins and Evanston and that Commercial had signed the September 1, 1977 stipulation because of the coercion, threats, and business duress instigated by appellant. In the alternative it aksed that the PSC declare that Sublette and Sweetwater Counties were not included in appellant's certificate as service areas. Appellant filed an answer and counterpetition on August 29, 1978. In it the claim was made that it was Commercial, not appellant, that had refused to cooperate in bringing radio telephone service to southwestern Wyoming.

On December 1, 1978, the PSC entered an order setting the matter for hearing and listed the following issues as those to be resolved:

> "a) Whether Industrial has in any manner violated the Commission's Order of November 29, 1977;
>
> "b) Whether there was fradulent inducement upon any party to sign the Stipulation of September 1, 1977; should such be found to exist, what impact, if any, does, this have upon the Stipulation and the parties who relied thereon;
>
> "c) What is the scope of the Stipulation with regard to the operating authority provided therein; and
>
> "d) To what extent, if any, has the public been harmed by the inability of the parties to comply with the Commission's Order of November 29, 1977 and what action, if any, is required in the public interest to alleviate such harm as may be found to exist."

The PSC then directed:

> "c) Both parties shall be under the same burden of producing sufficient evidence to show why their respective certificates of November 29, 1977 should not be revoked, altered or amended in any manner as may be required in the public interest."

Finally, the order noted:

> "5. The Commission shall not issue an Order to Show Cause to either petitioner in this proceeding as to why their respective certificates should not

be revoked or amended in any manner, but shall instead proceed upon a formal complaint basis. However due to the nature of each party's petition in this matter, each party shall consider their respective certificate grants to be in question and shall direct their evidence to include consideration of his point."

Hearings on the matter commenced January 23, 1979. On May 18, 1979, the PSC released its opinion and order. It provided in part:

"14. Resolution of the present controversy between Industrial and Commercial cannot be obtained without first examining and clarifying the certicated service area of each party. To the extent this clarification may amend and redefine either party's present service area, neither may thereafter complain for they were specifically informed of this possibility in the Commission's Notice and Order Setting Hearing referenced herein above at paragraph eight (8).

"The certificated service areas of Commercial, as noted previously, would consist of: (1) that area aencompassed by a 37 dbu contour eminating from Aspen Mountain; (2) that area encompassed by a 37 dbu contour eminating from Hogsback Ridge; (3) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Medicine Butte five (5) miles northeast of Evanston; and (4) a primary (90%) and secondary (75%) service area, non-exclusive radiating from Nine-Mile Hill, nine (9) miles north of Rawlins.

"The certificated service areas of Industrial would consist of: (1) a primary (90%) and secondary (75%) service area, non-exclusive radiating

from Marsh Peak, Utah; (2) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Medicine Butte, Wyoming; and (3) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Nine-Mile Hill.

"15. There has been a great deal of confusion concerning the areas certificated to Industrial for RCC service, primarily due to various ambiguities and errors in Commission's Order of November 29, 1977. Industrial first petitioned for authority to serve all or portions of Uinta; [,] Lincoln and Sweetwater Counties, Wyoming. It later requested, and was denied, leave to amend its application to include the Counties of Sublette and Carbon.

Industrial renewed its amendment request at the pre-hearing conference of August 29, 1977 and was allowed to include Carbon County, but Sublette was again refused due to lack of public notice. The Order of November 29, 1977 incorrectly states, in paragraph four (4) of the Findings of Fact at page five (5), that the Commission allowed Industrial to present evidence concerning Sublette County. To the extent this Findings of Fact at paragraph four (4) of the Order of November 29, 1977 is inconsistent with the testimony and evidence of record, it is hereby corrected by deleting Sublette County from the last sentence thereof.

"The confusion surrounding the service area of Industrial continues to exist however due to the various references throughout the Stipulation of September 1, 1977 to the 'application and requested amendments of each party.' Although it may be argued this language has the effect of including Sublette County, this argument is devoid of any merit or substance as the parties cannot by stipu-

lation usurp the jurisdiction specifically vested in this Commission by statute.**

"16. Each party to this proceeding has essentially asked the Commission to resolve the differences between them either by certificate cancellation or further directive. Each party has alleged the other is responsible for failing to comply with the terms and conditions of the Stipulation and that such other party is solely responsible for failing to comply with the terms and conditions of the Stipulation and that such other party is solely responsible for the failure to provide service to the public as ordered on November 29, 1977. Each has alleged numerous facts and produced certain testimony and exhibits to substantiate their respective positions. The only certain fact is that both parties have not complied with the order directing service be implemented to and for the public.***

* * * * * *

"Upon full and careful examination of the testimony and evidence produced in this proceeding concerning the various actions by each party herein, the Commission finds there is insufficient evidence to support a finding that the Stipulation of September 1, 1977 was a direct result of undue duress and influence upon Commercial Communications. Accordingly, the document shall remain in full force and effect as between the parties of interest herein and the other signatories to said document. Commercial was represented at all stages of the proceeding by legal counsel and was under no obligation to execute the document in question.

* * * * * *

"The Commission has reviewed the record at great length and must conclude the public has indeed been harmed by the inability of the parties to comply with the Stipulation, but finds that it cannot attribute fault to either party individually; both parties must bear a portion of this responsibility. Each party has made some effort to comply with the terms of the Stipulation, but neither has approached the matter in good faith due to the possible adverse business consequences that may result from the prospective relinquishment of VHF channels. The primary concern of the Commission in this case is not the competitive interests of the parties, but the public interest which is to be served by their respective utility operations. Each party is fully aware there are but a few VHF channels presently authorized by the Federal Communications Commission and that all such channels are presently in use in southwestern Wyoming. Accordingly, each party is aware that pursuit of his own best interest requires the authorization of as many VHF channels as possible which are free from co-channel interference with another utility. Both parties to this proceeding are aware of the channel problem and both are reluctant to accommodate the other's operations. Industrial presently utilizes five of the seven available channels and has petitioned the FCC for authority to utilize the remaining two. Commercial presently operation on only two channels, and is unwilling to execute any document whereby those would be the only channels it may use prospectively in the State of Wyoming. It is apparent, neither party is concerned with the public interest; both are seeking to further their own business interest. The Commission recognizes its responsibility in this matter and sees that resolution may only be obtained by a determination as to which

utility shall be entitled to use certain channels in specific locations in southwestern Wyoming. Based upon the testimony and evidence of record and the previous attempts of the parties to comply with the terms of the Stipulation, the Commission finds that Commercial should be entitled to operate on VHF Channels 1 and 9 in the Rock Springs, Green River, Evanston and LaBarge areas, and that Industrial should continue operations on its existing Channels 3, 5, 7, 11 and 13.

"17. The Commission recognizes the fact it does not have jurisdiction over the allocation of radio frequencies, but it does have jurisdiction over what is required in the public interest. The aforementioned Channel allocations are the result of the Commission's determination as to what Channels would be acceptable to this Commission in furtherance of the public interest each utility is required to serve.

"18. The controversy herein centers around two Wyoming cities, to-wit: Evanston and Rawlins, Wyoming. The application of Commercial specifically sought to serve these cities while the application of Industrial would seem to include such by implication. The aforementioned channel allocation shall resolve the dispute in and around the Evanston area, leaving only the Rawlins area in dispute. Each party stipulated in 1977 they would share VHF Channel 7 and that such a joint application would be made to the FCC. The parties subsequently met in accordance with the terms of the Stipulation, but due to various problems alleged by each party, neither was able to comply with the terms of the Stipulation. Industrial determined service could be rendered from existing Marsh Peak facilities, and Commercial deter-

mined that an independent application would be required due to the inability of the parties to comply with the terms of the Stipulation.

"The Commission finds there is no testimony in evidence of record to support a finding it is impractical or impossible for either party to complete the terms of the Stipulation as such concerns the Rawlins service area. Accordingly, the Commission finds the Stipulation shall continue to be in full force and effect and that both parties shall hereafter be required to jointly apply to the FCC for shared authority on VHF Channel 7.

"19. The final issue as framed by the Notice and Order Setting Hearing which requires resolution herein, is whether or not either party should have their operating certificate revoked. As noted previously, it is difficult if not impossible for this Commission to attribute fault to any one party based upon the confusing and often contradictory testimony and evidence of record. As noted hereinabove, the Commission has found the Stipulation to be in full force and effect and that each party is still bound by the terms and conditions contained therein. The Stipulation also provides that such will continue until otherwise ordered by this Commission. Accordingly, both parties shall be ordered to obtain the FCC authority recommended herein within six months of the date of this order, and to thereafter provide service within nine months of FCC channel authorization. Should either party fail to so act, either individually or jointly, the Commission shall immediately take steps necessary to revoke their respective certificate authorities granted in the Evanston and Rawlins service areas."

Both appellant and Commercial filed for rehearing and clarification. On August 29, 1979, the PSC denied their petitions. Appellant then sought review of the PSC order in the district court. Following the submission of briefs by appellant, Commercial and the PSC, on September 17, 1980, the district court judge affirmed the PSC's order.

Appellant's first challenge to the PSC's order claims that the "Commission exceeded its authority in attempting to allocate common carrier two-way radio telephone channels when the allocation and granting of such channels is in the exclusive jurisdiction of the Federal Communications Commission (FCC)." Appellant's second challenge attacks PSC's establishment of time limits. However, as to these issues, appellant during the PSC's hearings advocated that the PSC both allocate channels and create time restrictions for compliance. Appellant's counsel stated during his closing remarks to the Commission on March 7, 1979, that:

> "It seems to us that is the better way to handle it, and we believe this Commission has the power and authority to do it is to have these parties deal on muchly [sic] exclusive channels and that this Commission order compliance with that kind of an arrangement within a certain period of time.
>
> "In that period of time and within that period of time they do not do it, it then should be a question about revoking a certificate, because as long as these matters are tied up in the Federal Communications Commission, we are not going to have service that is needed in the southwest portion of Wyoming.
>
> "Now, what we would like to see is to come to some kind of a directive from this Commission telling the parties, 'Look, you are going to have to do it this way so that our people can get the service

that you tell us is needed.'

* * * * * *

"I would suggest to the Commission that the Commission has the power, and I think if we are going to resolve this matter within the foreseeable future, this Commission should act on it, and we, of course, will supply the Commission with the authority and statistics and data that we believe it can act upon.

"Thank you."

In appellant's brief filed with the Commission on April 27, 1977, it was argued that:

"Each of the parties is presently operating on five mobile radio channels in southwestern Wyoming. The fastest and least expensive way to insure full interference free service to the public is to prevent the continuing dispute about interference in situations where two persons have authority over the same channels in wide area coverage situations. Thus, although enforcing the Commission's order based on the stipulation would be one solution to the present impasse, *the better approach appears to be to require the parties to operate on different channels to avoid all interference problems and require the parties to take such action immediately under the risk of losing Commission authority to operate.*

"It is the position of Industrial that the Wyoming Public Service Commission has the power to regulate RCC's [radio common carriers] operating in the State of Wyoming so long as such regulation does not violate the applicable FCC rules *in regard to the procedural granting of channel*

*licenses and the physical operation thereof.****

* * * * * *

"The exercise of the above described authority in this case would not infringe on the authority of the FCC.***

* * * * * *

"As was proposed above, it appears that the best way to obtain radio common carrier service for the public in southwestern Wyoming on an interference free basis, is for this Commission to take action within its powers and require the parties to provide service forthwith.** The Commission could enforce its order by revoking the certificate of any party who failed to comply with the Commission's order within a fixed period. The order would neccessarily include the requirement that the parties settle their disputes before the FCC and require that Industrial withdraw its application for channels 1 and 9 in Evanston. The Commission might also consider the limitation of further applications by the parties to the FCC for additional UHF channels except on some equitable basis which would insure interference free service to the public. Commercial's own expert believes the Commission has the power to involve the above solution." (Emphasis added.)

Thus it is clear that appellant asked the PSC to do as it did. Now on appeal appellant challenges that action.

Appellant also alleges that the PSC exceeded its authority by prescribing his radio service area. However, this issue was never raised before the PSC. In fact in appellant's Application for Rehearing and Clarification of Order, he

argued that the Commission had failed to establish primary and secondary service areas:

> "2. The Commission's Memorandum Opinion and Order failed to provide Industrial primary and secondary service areas radiating from Aspen Mountain and Hogsback Ridge for service in Lincoln and Sweetwater Counties, Wyoming which authority Industrial was granted by the Commission's order of November, 1977...***"

As a general rule, parties as bound by the theories they advanced below. *Laramie Printing Trustees v. Krueger,* Wyo. 1968, 437 P.2d 856, 859. Further, under the doctrine of invited error, if a party induces action by a court or an agency, he will not be heard on appeal to argue error based upon that action. *Weber v. Johnston Fuel Liners, Inc.,* Wyo. 1974, 519 P.2d 972, 978. However, there is an exception to that rule. As noted in *Matter of Various Water Rights in Lake DeSmet Reservoir,* Wyo. 1981, 623 P.2d 764, 767, a challenge to a court's or a quasi-judicial body's jurisdiction over the subject matter can never be waived. "[I]t is open for consideration by the reviewing court whenever it is raised by any party, or it may be raised by the court of its own motion." *Gardner v. Walker,* Wyo. 1962, 373 P.2d 598, 599.

[3] In this case appellant's challenges in essence question the jurisdiction of the PSC to grant conditional certificates of convenience and necessity. This is done on two levels. First, it is contended that there is no statutory authorization for the PSC's action. Second, appellant argues that the PSC's conduct infringes upon the exclusive jurisdiction of the Federal Communications Commission (FCC) and thus violates the concept of federal preemption. Since appellant's challenges raise questions concerning the PSC's subject matter jurisdiction, they must be addressed on their merits. Jurisdiction may be questioned at any time. *Merritt v. Merritt,* Wyo. 1978, 586 P.2d 550, 555.

First, as to appellant's statutory argument that the PSC lacked jurisdiction to impose conditions upon the grant of a certificate of convenience and necessity, the language of § 37-2-205(a), W.S. 1977, indicates that he is erroneous. It states in part that where a conflict between two utilities may result, the PSC "may after hearing make such order and prescribe the terms and conditions for the location of the lines, plants or systems affected,*** [which] are just and reasonable." Further as observed by this court previously, "[t]he discretion vested in the commission by the statute is broad indeed***." *Big Horn Rural Elec. Co. v. Pacific Power & Light Co.*, Wyo. 1964, 397 P.2d 455, 458. Thus, we conclude that the statute granted the PSC the authority to impose the various conditions imposed in this case.

Next, we must consider whether the exercise of this jurisdiction has been barred under the doctrine of federal preemption—which results from the Supremacy Clause, Art. VI, clause 2 of the United States Constitution.[3] In *Florida Lime and Avocado Growers, Inc. v. Paul*, 1963, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248, it was observed by the Supreme Court that:

> "The principle to be derived from our decisions is that federal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so obtained..."

The Court in that case following its observation then looked at three criteria in order to make its determination. First, it considered whether it was possible for one engaged in interstate commerce to comply with both the federal and the state regulations. Second, it pondered upon the question of how important it was that there be national uniformity—without any state variations—in the regulation of the sub-

ject matter in question. Third, the Court investigated what Congress had intended when it established the federal regulation. Here, the Court noted that the presumption was against Federal preemption unless Congress had manifested a clear intent to the contrary.

This case was followed in *A TS Mobile Telephone, Inc. v. Curtin Call Communications, Inc.* 1975, 194 Neb. 404, 232 248,[4] where the question was whether the Nebraska PSC had N.W.2d jurisdiction to regulate radio common carriers. The Nebraska Supreme Court, after applying the three-prong test, concluded no federal preemption had occurred and that the Nebraska PSC had good jurisdiction.

We agree with the conclusion that there has been no federal preemption. First, the parties can comply with both the PSC's and FCC's rules and regulations. Second, there is no reason for federally imposed uniformity in the regulation of radio common carriers. As said by the Nebraska Supreme Court, "it is clear that the mobile radio telephone paging service is local in nature and there is no need for national uniformity." *A TS Mobile Tel. v. Curtin Call Comm., Inc.*, supra, 232 N.W.2d at 253. Finally, Congress has expressed an intent not to preempt the area. In 47 U.S.C. § 221(b), it was stated:

> "(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telepoint-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, *in any case where such matters are subject to regulation by a State commis-*

sion or by local governmental authority." (Emphasis added.)

Courts have generally recognized that this language "is a clear statement that Congress did not intend to preempt state regulation of mobile carriers..." *Fields v. Davis,* 1977, 31 Or.App. 607, 571 P.2d 511, 516. As a result we must uphold the PSC's jurisdiction to regulate radio common carriers by imposing conditions on the grant of a certificate of public convenience and necessity. See also *Matter of Rule Radiophone Service, Inc.,* Wyo. 1980, 621 P.2d 241.

Appellant's final claim is that the PSC "without a basis in fact or law arbitrarily and capriciously reduced Industrial Communication's service area granted in 1977." However the PSC, when it noticed the setting of the matter for hearing in 1979, informed both appellant and Commercial that they would be required to bear the "burden of producing sufficient evidence to show why their respective certificates of November 29, 1977 should not be revoked, altered or amended in any manner as may be required in the public interest."

First, the PSC found that the order of November 29, 1977 incorrectly included Sublette County in appellant's service area. It is clear that the Commission has continuing jurisdiction over public utilities and thus the power to amend certificates of public necessity and convenience. *Big Horn Rural Elec. Co. v. Pacific Power & Light Co.,* supra, 397 P.2d at 461. It is only proper that the PSC should have the ability to correct a previous order which contained a mistake. *Besl Corp. v. Public Utilities Commission,* 1976, 45 Ohio St.2d 146, 341 N.E.2d 835.

As to other reductions in appellant's service area, the PSC had given notice that it was reviewing appellant's certificate and that appellant had the burden of demonstrating that it should not be revoked. The evidence presented to

the PSC was conflicting as to what interference might exist between appellant's services and Commercial's. The Commission's conclusion that the best way to resolve the matter was to reduce the service areas was supported by substantial evidence that appellant's and Commercial's operations overlapped and the operations of each were interfering with the other contrary to the public interest. Therefore, this court cannot substitute its judgment on this issue for that of the PSC's. *Sage Club, Inc. v. Employment Security Commission of Wyoming,* Wyo. 1979, 601 P.2d 1306. The ultimate weight to be given evidence before the PSC as a trier of fact is to be determined in the light of the expertise and experience of the members of that agency. *Matter of Rule Radiophone Service, Inc.*, supra.

Affirmed.

1. Radio common carriers generally provide mobile telephone service and on occasion paging services such as beepers.

2. Radio common carriers are public utilities as defined by § *37-1-101(a)(vi)(B), W.S. 1977:*

"(vi) 'Public utility' means and includes every person that owns, operates, leases, contorls, or has power to operate, lease or controls:

* * * * *

"(B) Any plant, property or facility for the transmission to or for the public of telephone messages, for the conveyance or transmission to or for the public of telegraph messages, or for the furnishing of facilities to or for the public for the transmission of intelligence by electricity;"

3. Art. VI, clause 2, United States Constitution:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any Stage to the Contrary notwithstanding."

4. This case was overruled to the extent that it applied to one-way paging devices in *A TS Mobile Telephone, Inc. v. General Communications Co., Inc.* 1979, 204 Neb. 141, 282 N.W.2d 16. However, for our purposes in dealing with two-way radio telephone service (see appellant's statement of issues, supra), the case is still good law as to the question before us.

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1981

NO. 5410

IN THE MATTER OF THE APPEAL OF DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS FROM A DECISION OF THE WYOMING PUBLIC SERVICE COMMISSION IN DOCKET NO. 9661, SUB 1 DATED MAY 18, 1979, AS ALTERED BY ITS DECISION DATED AUGUST 29, 1979.

DAVID R. WILLIAMS, d/b/a INDUSTRIAL COMMUNICATIONS,

Appellant
(Petitioner),

v.

PUBLIC SERVICE COMMISSION OF WYOMING and COMMERCIAL COMMUNICATIONS, INC..

Appellees
(Respondents)

ORDER DENYING REHEARING

After careful consideration, it is

ORDERED that appellant's Application for Rehearing be and is hereby denied.

May 12, 1981.

By the Court

ROBERT R. ROSE, JR.
Chief Justice

Before ROSE, C.J., McCLINTOCK*, RAPER, THOMAS and ROONEY, JJ.

*McCLINTOCK, J., retired March 26, 1981, but continued to participate in the decision of the court in this case pursuant to order of the court entered March 30, 1981.

APPENDIX B

BEFORE THE PUBLIC SERVICE COMMISSION
OF WYOMING

Docket No. 9661
SUB 1

IN THE MATTER OF THE APPLICATION OF COMMERCIAL COMMUNICATIONS, INC. AGAINST DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS AND THE PETITION OF COMMERCIAL FOR AN ORDER CANCELLING THE OPERATING AUTHORITY OF INDUSTRIAL

and

IN THE MATTER OF THE COUNTER PETITION OF DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS FOR AN ORDER DIRECTING COMMERCIAL COMMUNICATIONS, INC. TO COMPLY WITH THE ORDER OF THE PUBLIC SERVICE COMMISSION OF WYOMING DATED NOVEMBER 29, 1977.

APPEARANCES

MR. DAVID H. CARMICHAEL and MR. JOHN C. PATTON of Carmichael, McNiff, Statkus and Patton, Attorneys at Law, of Cheyenne, Wyoming, appearing for the Petitioner Commercial Communications, Inc.

MR. WALTER P. FABER, JR. and MR. MICHAEL A. NEIDER of Watkins and Faber, Attorneys at Law, Salt Lake City, Utah, and MR. WARD A. WHITE, of Guy, Williams and White, Attorneys at Law, of Cheyenne, Wyoming, appearing for the Respondent, David R. Williams d/b/a Industrial Communications

HEARD BEFORE
CHAIRMAN C.E. JOHNSON, COMMISSIONER JOHN R. SMYTH and COMMISSIONER G. KEITH OSBORN:
Commissioner Smyth presiding

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

This matter is before the Public Service Commission of Wyoming upon the formal complaint of Commercial Communications, Inc. (hereinafter referred to as Commercial or Petitioner) against David R. Williams d/b/a Industrial Communications (hereinafter referred to as Industrial or Respondent) whereby Commercial seeks an order cancelling the certificate authority heretofore granted by this Commission to Industrial. Industrial filed an answer and counter petition to the complaint of Commercial, requesting that Commercial be ordered to comply with the provisions of the Commission Order dated November 29, 1977. The pleadings of the parties hereto having framed several contested issues, the Commission proceeded to public hearing on the Complaint and Counter Petition.

After full and careful consideration of the testimony and evidence produced at the public hearing held in this matter, and upon review of the requirements of the Wyoming Administrative Procedure Act and Title 37 of the Wyoming Statutes, the Commission hereby enters it's Memorandum Opinion and Order.

FINDINGS OF FACT

1. On or about the 29th day of November, 1977, the Commission entered its Order in Docket Nos. 9604 Sub 1, 9639 Subs 1 and 2, 9600 Sub 1 and 9661 granting certificate authority to four distinct and separate radio common carrier (RCC) operations to provide mobile phone and pocket paging service to certain portions of southwestern Wyoming. Commercial and Industrial were parties to that proceeding

under Docket Nos. 9604 Sub 1 and 9661 respectively. The various parties to this consolidated proceeding executed a stipulation on September 1, 1977 whereby all contested issues were compromised and settled to the satisfaction of each party of interest. This stipulation, which was later adopted by the Commission in its Order of November 29, 1977, specifically provided that Commercial and Industrial would jointly apply to the FCC for a construction permit and license for VHF Channel 7 in the Rawlins, Wyoming service area and that neither would use the Channel during any period so as to prevent the use by the other of one half of the Channel time. Commercial and Industrial further agreed to subsequently resolve any interference problem as may occur with regard to VHF Channels 1 and 9 in the Evanston, Wyoming area. The stipulation was signed by all parties of interest and their respective attorneys.

2. On August 2, 1978, Commercial filed a Formal Complaint and petition for cancellation of the Certificate of Public Convenience and Necessity issued to Industrial, alleging essentially that Industrial had failed to comply with the terms and conditions of the Stipulation executed September 1, 1977 and that Commercial therefore has been unable to provide service to and for the public in accordance with the terms of the Order of this Commission.

3. A copy of the Formal Complaint was mailed to Industrial by certified mail, return receipt requested, on August 7, 1978. Industrial was given directions to file an answer to the Complaint within ten days from the date of service in accordance with Rule 10 of the Rules of Practice and Procedure of this Commission.

4. On August 16, 1978, Industrial filed a Petition for additional time within which to answer the formal Complaint of Commercial; an Order granting an extension to the answer period was entered on August 18, 1978, thereby

requiring Industrial to file an answer on or before August 29, 1978.

5. On August 29, 1978, Industrial filed an Answer and Counter Petition to the formal Complaint of Commercial, alleging that it had been prepared at all times to comply with the Order of this Commission but that Commercial had frustrated this intention through repeated failures to compromise and settle their various disputes.

6. On October 4, 1978, the Commission notified both parties of interest it would hold a pre-hearing conference into the matter on November 15, 1978 at 9:00 a.m. in Cheyenne for the express purpose of delineating issues and determining Commission jurisdiction. By Special Order dated October 4, 1978, the Commission designated one commissioner or hearing examiner to conduct and preside over the pre-hearing conference to be held concerning this matter.

7. The pre-hearing conference commenced on the date noted above and concluded on the same day. Both parties were present with retained counsel and fully participated in the discussions. All issues to be heard in the forthcoming hearing were specifically stated and subsequently incorporated in the Notice and Order Setting Hearing dated December 1, 1978.

8. On the first day of December, 1978, the Commission issued it's Notice and Order Setting the Formal Complaint and Counter Petition of the parties for public hearing, such to commence on the 23rd day of January, 1979 at 9:00 a.m. in the Hearing Room of the Public Service Commission at Cheyenne, Wyoming. This Order framed the following matters to be at issue as a result of the pre-hearing conference held previously:

(a) Whether Industrial has in any manner violated

the Commission's Order of November 29, 1977;

(b) Whether there was fradulent inducement upon any party to sign the stipulation of September 1, 1977; should such be found to exist what impact, if any, does this have upon the stipulation and the parties who relied thereon;

(c) What is the scope of the stipulation with regard to the operating authority provided therein; and

(d) To what extent, if any, has the public been harmed by the inability of the parties to comply with the Commission's Order of November 29, 1977, and what action, if any, is required in the public interest to alleviate such harm as may be found to exist.

This Order further provided that the Commission would consider the certificate authority previously granted to both carriers to be in question and that both parties would be under the same burden of providing sufficient evidence to show why their respective certificates of November 29, 1977 should not be revoked, altered or amended in any manner as may be required in the public interest.

9. On January 12, 1979, Commercial filed a Motion for Production of Documents, or in the alternative for issuance of a Subpoena Duces Tecum. Industrial filed an objection to the Motion on January 16, 1979, alleging essentially that the information sought constitute confidential commercial communications, that the documents requested were quite voluminous and that a burdensome search would be required to produce said documents, that the Motion was untimely, and that the documents and records requested were irrelevant and immaterial to the subject of the Commission's Order dated November 1, 1978. The Motion was set for public hearing on the 23rd day of January, 1979 at 9:00 a.m. in the Commission hearing room; the public hearing thereto-

fore set to commence on January 23, 1979 was continued until February 13, 1979.

10. The hearing upon the Motion commenced on the 23rd day of January, 1979 and concluded on the same day. At the conclusion of said hearing, the Commission rendered a bench decision specifically granting and denying certain portions of the Motion of Commercial, the substance of which was later incorporated in a formal Order dated January 26, 1979. All materials found to be relevant and subject to discovery were to be produced by Industrial on or before February 8, 1979.

11. The public hearing concerning this contested matter commenced on the 13th day of February 1979 at 9:00 a.m. in the Hearing Room of the Public Service Commission at Cheyenne, Wyoming and continued until the following day at 2:10 p.m. at which time the hearing was recessed until March 6, 1979 at 9:00 a.m.

The public hearing continued on March 6, 1979 in the hearing room of this Commission and concluded the following day. The parties were directed to file simultaneous briefs within 30 days from the date of receipt by the Commission of the original transcript; both parties complied with this directive and all findings pertinent to this case terminated on the 27th day of April, 1979. The parties entered 42 exhibits into evidence and produced 694 pages of sworn testimony throughout the course of this proceeding.

12. Commercial is an operating public utility as defined by W.S. 37-1-101(a)(vi)(B), having been previously certificated by this Commission on September 5, 1974 to provide mobile radio-telephone and one-way paging service on the VHF spectrum to the public in the cities of Green River and Rock Springs, Wyoming, and to those areas within a 50 mile radius thereto. On the 21st day of January, 1976, Commercial requested authority, by letter, to add two UHF channels

and one paging channel in the Rock Springs area to improve and upgrade service for existing customers. The Commission granted the request of Commercial through formal letter dated January 28, 1976. Approximately three months later on April 12, 1976, Commercial wrote another letter to the Commission requesting authority to add base and repeater facilities in the areas of LaBarge and Big Piney, Wyoming to improve and upgrade service to customers in that area. This upgrade was to be accomplished by the installation of one UHF and one VHF channel located on Hogsback Ridge northwest of LaBarge. The Commission again approved the request of Commercial through formal letter dated April 30, 1976.

Commercial submitted a letter to the Commission on June 30, 1976 for authority to provide UHF and VHF service to the Town of Rawlins and surrounding areas. Commercial was informed by staff members of the Commission that due to the area requested being outside its then certificated area, it would be necessary for Commercial to file a formal application for the requested authority. Commercial filed an application on January 28, 1977 for authority to provide mobile and paging service to the cities of Evanston and Rawlins, Wyoming and surrounding environs on one UHF and one VHF channel at each location. This application subsequently evoked numerous protests, interventions and corresponding certificate requests by three other applicants, culminating in the consolidated hearing of August 29, 1977 and subsequent order of the Commission dated November 29, 1977.

13. Industrial is an operating public utility as defined by W.S. 37-1-101(a)(vi)(B), having been certificated by the Commission on November 29, 1977 to provide mobile radiotelephone, dispatch and paging common carrier service to the public in both rural and municipal areas of Lincoln, Uinta, Sweetwater and Carbon Counties, Wyoming. Industrial filed its application for certificate authority to operate

in the aforementioned counties, except Carbon, on February 21, 1977. Service to these areas was to be provided from an existing transmitter facility located on Marsh Peak in Uinta County, Utah, and through the installation of a repeater station on Medicine Butte, seven miles northeast of Evanston, Wyoming.

14. Resolution of the present controversy between Industrial and Commercial cannot be obtained without first examining and clarifying the certificated service area of each party. To the extent this clarification may amend and re-define either party's present service area, neither may thereafter complain for they were specifically informed of this possibility in the Commission's Notice and Order Setting Hearing referenced hereinabove at paragraph eight (8).

The certificated service areas of Commercial, as noted previously, would consist of: (1) that area encompassed by a 37 dbu contour eminating from Aspen Mountain; (2) that area encompassed by a 37 dbu contour eminating from Hogsback Ridge; (3) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Medicine Butte five (5) miles northeast of Evanston; and (4) a primary (90%) and secondary (75%) service area, non-exclusive radiating from Nine-Mile Hill, nine (9) miles north of Rawlins.

The certificated service areas of Industrial would consist of: (1) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Marsh Peak, Utah; (2) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Medicine Butte, Wyoming; and (3) a primary (90%) and secondary (75%) service area, non-exclusive, radiating from Nine-Mile Hill.

15. There has been a great deal of confusion concerning the areas certificated to Industrial for RCC service, primarily due to various ambiguities and errors in Commission's Order of November 29, 1977. Industrial first petiti-

oned for authority to serve all or portions of Uinta; Lincoln and Sweetwater Counties, Wyoming. It later requested, and was denied, leave to amend its application to include the Counties of Sublette and Carbon. Industrial renewed its amendment request at the pre-hearing conference of August 29, 1977 and was allowed to include Carbon County, but Sublette was again refused due to lack of public notice. The Order of November 29, 1977 incorrectly states, in paragraph four (4) of the Findings of Fact at page five (5), that the Commission allowed Industrial to present evidence concerning Sublette County. To the extent this Finding of Fact at paragraph four (4) of the Order of November 29, 1977 is inconsistent with the testimony and evidence of record, it is hereby corrected by deleting Sublette County from the last sentence thereof.

The confusion surrounding the service area of Industrial continues to exist however due to the various references throughout the Stipulation of September 1, 1977 to the "application and requested amendments of each party." Although it may be argued this language has the effect of including Sublette County, this argument is devoid of any merit or substance as the parties cannot by stipulation usurp the jurisdiction specifically vested in this Commission by statute. Even if we were able to assume arguendo there is no ambiguity concerning Sublette County, such is still outside the certificated service area of the utility as defined by the Order of November 29, 1977 at page eight (8). The primary service area of Industrial, eminating from either Medicine Butte or Marsh Peak, will not encompass Sublette County.

16. Each party to this proceeding has essentially asked the Commission to resolve the differences between them either by certificate cancellation or further directive. Each party has alleged the other is responsible for failing to comply with the terms and conditions of the Stipulation and that such other party is solely responsible for the failure to

provide service to the public as ordered on November 29, 1977. Each has alleged numerous facts and produced certain testimony and exhibits to substantiate their respective positions. The only certain fact is that both parties have not complied with the order directing service be implemented to and for the public. As moving party to the controversy herein, Commercial had the initial burden of producing sufficient evidence to substantiate its claims and request that Industrial's certificate of public convenience and necessity be revoked. Accordingly, the Commission shall attempt to hereafter discuss the various contentions of Commercial and render it's findings thereon:

a. *Business Compulsion.* The primary argument of Commercial to attack the basis and foundation of the Stipulation and thereby render it void was the argument that such was procured as a result of undue duress and influence, or more specifically, business compulsion. Commercial argues essentially that it was forced into the Stipulation by various threats and representations made by Industrial during settlement negotiations to the consolidated hearing of August 29, 1977. Commercial asserts it was coerced into executing the Stipulation and that subsequent to the Commission order of November 29, 1977, Industrial failed to comply with either the terms of said Stipulation or subsequent oral representations made by the principal of Industrial, Mr. David Williams.

Upon full and careful examination of the testimony and evidence produced in this proceeding concerning the various actions by each party herein, the Commission finds there is insufficient evidence to support a finding that the Stipulation of September 1, 1977 was a direct result of undue duress and influence upon Commercial Communications. Accordingly, the document shall remain in full force and effect as between the parties of interest herein and the other signatories to said document. Commercial was represented at all stages of the proceeding by legal counsel and was under no obligation to execute the document in question.

b. *Industrial compliance with PSC jurisdiction.* Commercial asserted in its pleadings and testimony that Industrial had failed to comply with the statutory requirements of a public utility operating within the State of Wyoming and had accordingly rejected this Commission's jurisdiction over its utility operations. In paragraph 12 of the Stipulation, Industrial agreed to recognize that the Wyoming Public Service Commission shall have jurisdiction over all intrastate matters with respect to radio common carrier service by way of Wyoming statutory authority excluding those matters pre-empted by Federal Statutes, rules, regulations and decisions. Reference is made thereafter by Commercial to the fact Industrial has not applied for Wyoming certificate authority to install a transmitter on Hogsback Ridge, yet it has applied for such authority from the FCC. Further, Commercial states that Industrial has always acted in disregard of this State's jurisdiction as evidenced by the fact Industrial filed for non-interconnect authority on Channels 1 and 9 immediately prior to the contested hearing in 1977, but subsequent to the issuance of a notice and order setting the contested matter for public hearing. While there is merit to the argument of Commercial, it is tainted by the fact Commercial has also failed to submit to the jurisdiction of this Commission as evidenced by its FCC filing for Channels 3 and 7 in Rock Springs.

Full and careful analysis of this contention results in a finding that Industrial has failed to observe the jurisdictional parameters of this Commission, but such neglect cannot be deemed either intentional nor unintentional due to insufficient testimony and evidence of record concerning this point. Industrial is admonished and hereby informed that this Commission shall assert jurisdiction over all utility activities by a radio common carrier operating within the State of Wyoming regardless of whether such operations are on an interconnect or non-interconnect basis.

c. *Public Interest.* Commercial argues that as a

result of Industrial's repeated failures to comply with the terms of the Stipulation, the public has been harmed by the inability of the utilities to provide the service as certificated by this Commission. Industrial asserted that whatever fault may lie with the inability of the parties to comply with the terms of the Stipulation, such must be attributed solely to Commercial.

The Commission has reviewed the record at great length and must conclude the public has indeed been harmed by the inability of the parties to comply with the Stipulation, but finds that it cannot attribute fault to either party individually; both parties must bear a potion of this responsibility. Each party has made some effort to comply with the terms of the Stipulation, but neither has approached the matter in good faith due to the possible adverse business consequences that may result from the prospective relinquishment of VHF channels. The primary concern of the Commission in this case is not the competitive interests of the parties, but the public interest which is to be served by their respective utility operations. Each party is fully aware there are but a few VHF channels presently authorized by the Federal Communications Commission and that all such channels are presently in use in southwestern Wyoming. Accordingly, each party is aware that pursuit of his own best interest requires the authorization of as many VHF channels as possible which are free from co-channel interference with another utility. Both parties to this proceeding are aware of the channel problem and both are reluctant to accommodate the other's operations. Industrial presently utilizes five of the seven available channels and has petitioned the FCC for authority to utilize the remaining two. Commercial presently operations on only two channels, and is unwilling to execute any document whereby those would be the only channels it may use propsectively in the State of Wyoming. It is apparent, neither party is concerned with the public interest; both are seeking to further their own business interest. The Commission recognizes its responsibility

in this matter and sees that resolution may only be obtained by a determination as to which utility shall be entitled to use certain channels in specific locations in southwestern Wyoming. Based upon the testimony and evidence of record and the previous attempts of the parties to comply with the terms of the Stipulation, the Commission finds that Commercial should be entitled to operate on VHF Channels 1 and 9 in the Rock Springs, Green River, Evanston and LaBarge areas, and that Industrial should continue operations on its existing Channels 3, 5, 7, 11 and 13.

17. The Commission recognizes the fact it does not have jurisdiction over the allocation of radio frequencies, but it does have jurisdiction over what is required in the public interest. The aforementioned Channel allocations are the result of the Commission's determination as to what Channels would be acceptable to this Commission in furtherance of the public interest each utility is required to serve.

18. The controversy herein centers around two Wyoming cities, to-wit: Evanston and Rawlins, Wyoming. The application of Commercial specifically sought to serve these cities while the application of Industrial would seem to include such by implication. The aforementioned channel allocation shall resolve the dispute in and around the Evanston area, leaving only the Rawlins area in dispute. Each party stipulated in 1977 they would share VHF Channel 7 and that such a joint application would be made to the FCC. The parties subsequently met in accordance with the terms of the Stipulation, but due to various problems alleged by each party, neither was able to comply with the terms of the Stipulation. Industrial determined service could be rendered from existing Marsh Peak facilities, and Commercial determined that an independent application would be required due to the inability of the parties to comply with the terms of the Stipulation.

The Commission finds there is no testimony in evi-

dence of record to support a finding it is impractical or impossible for either party to complete the terms of the Stipulation as such concerns the Rawlins service area. Accordingly, the Commission finds the Stipulation shall continue to be in full force and effect and that both parties shall hereafter be required to jointly apply to the FCC for shared authority on VHF Channel 7.

19. The final issue as framed by the Notice and Order Setting Hearing which requires resolution herein, is whether or not either party should have their operating certificate revoked. As noted previously, it is difficult if not impossible for this Commission to attribute fault to any one party based upon the confusing and often contradictory testimony and evidence of record. As noted hereinabove, the Commission has found the Stipulation to be in full force and effect and that each party is still bound by the terms and conditions contained therein. The Stipulation also provides that such will continue until otherwise ordered by this Commission. Accordingly, both parties shall be ordered to obtain the FCC authority recommended herein within six months of the date of this order, and to thereafter provide service within nine months of FCC channel authorization. Should either party fail to so act, either individually or jointly, the Commission shall immediately take steps necessary to revoke their respective certificate authorities granted in the Evanston and Rawlins service areas.

CONCLUSIONS OF LAW

1. Commercial and Industrial are operating public utilities as defined by W.S. 37-1-101(a)(vi)(B).

2. As an operating public utility, both Commercial and Industrial are subject to the jurisdiction and regulatory policies of this Commission in accordance with W.S. 37-2-112.

3. The operating certificates heretofore granted Commercial and Industrial were issued in accordance with the

provisions of W.S. 37-2-205.

4. Proper notice of the public hearing held in this matter between the parties of interest was given in accordance with W.S. 9-4-107.

5. The provisions of W.S. 37-2-205 empower the Commission to amend certificates of public convenience and necessity. *In Re Pacific Power and Light Company*, 397 P.2d 455 (1964), *In Re Riverton Valley Electric Association*, 391 P.2d 489 (Wyo 1964), and *Svilar Light and Power, Inc. v. Riverton Valley Electric Association*, 355 P.2d 52.

6. A certificate of public convenience and necessity is subject to the statutory authority of this Commission to alter, amend or modify the certificate provided however that notice and opportunity for hearing are provided to all parties of interest. The Commission is further empowered to correct a previous order if based upon inadvertance or mistake. See *Wiley v. United States*, 245 F. Supp. 669; *Best Corp. v. Ohio Public Utilities Commission*, 341 NE 2d 835 (Ohio 1976); *Western Pennsylvania Water Co. v. State of Pennsylvania*, 311 A 2d 370 (Pa. 1973).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The complaint of Commercial Communications, Inc. and the counter-petition of David R. Williams d/b/a Industrial Communications be, and the same are hereby denied.

2. Commercial Communications, Inc. and David R. Williams d/b/a Industrial Communications are hereby ordered to comply with and fulfill the terms and conditions of the Stipulation executed by the parties on September 1, 1977, and that such compliance shall result in corresponding FCC authorization for the Channel allocations noted herein

within six months of the date of this order and thereafter service shall be provided on said channels within nine months of FCC authorization, provided however, that should either party fail to comply with the time periods established herein, its certificate of public convenience and necessity to provide said service shall be revoked.

3. The certificate authority previously granted Industrial in Docket No. 9661 is hereby amended to conform to the service area detailed herein at paragraph 15.

4. This order shall become effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this 18th day of May, 1979.

PUBLIC SERVICE COMMISSION
OF WYOMING
C.E. JOHNSON, Chairman
JOHN R. SMYTH, Commissioner
G. KEITH OSBORN, Commissioner

(SEAL)

ATTEST:
JON R. FORWOOD
Assistant Secretary

BEFORE THE PUBLIC SERVICE COMMISSION
OF WYOMING

DOCKET NO. 9661
SUB 1

IN THE MATTER OF THE FORMAL COMPLAINT OF COMMERCIAL COMMUNICATIONS, INC. AGAINST DAVID R. WILLIAMS D/B/A INDUSTRIAL COMMUNICATIONS AND THE PETITION OF COMMERCIAL FOR AN ORDER CANCELLING THE OPERATING AUTHORITY OF INDUSTRIAL.

IN THE MATTER OF THE COUNTER-PETITION OF DAVID R. WILLIAMS D/B/A INDUSTRIAL COMMUNICATIONS FOR AN ORDER DIRECTING COMMERCIAL COMMUNICATIONS, INC. TO COMPLY WITH THE ORDER OF THE PUBLIC SERVICE COMMISSION OF WYOMING DATED NOVEMBER 29, 1977.

ORDER DENYING PETITION FOR REHEARING

BY THE COMMISSION:

This matter is before the Public Service Commission of Wyoming upon the separate and reciprocal Petitions of Commercial Communications, Inc. and David R. Williams d/b/a Industrial Communications for a rehearing into the matters referenced above in Docket No. 9661 Sub 1.

The Commission, having considered the Petitions and response thereto filed by the parties of interest, and acting in accordance with the requirements of the Wyoming Administrative Procedure Act and Wyoming Utility Law, hereby enters its Order Denying Rehearing.

FINDINGS OF FACT

1. On or about the 18th day of May, 1979, the Commission entered its Order in Docket No. 9661 Sub 1 whereby each party thereto was ordered to comply with the terms and conditions of the stipulation executed by the parties on September 1, 1977. As a further matter, the Commission amended the certificated service area of Industrial Communications to a specifically defined area in southwestern Wyoming.

2. On the 15th day of June, 1977, David R. Williams d/b/a Industrial Communications (hereinafter referred to as Industrial) filed an application for rehearing and clarification of the order, stating therein that:

a) The Commission should not have removed Sublette County from the certificated service area of Industrial;

b) The Commission failed to provide primary and secondary service areas radiating from Aspen Mountain and Hogsback Ridge for service in Lincoln and Sweetwater Counties;

c) Industrial is apparently required to dismiss its present application before the Federal Communications Commission (FCC) for Channels 1 and 9 in Evanston, an action which is in apparent contradiction with the 1977 Order;

d) The Commission should clarify VHF channel allocations in Evanston, Rock Springs, LaBarge and Rawlins if a complete system separation is the intention of the Commission; and

e) The Commission should clarify its position with regard to "wide area coverage".

3. A Petition for Rehearing and Clarification of Order was also filed by Commercial Communications, Inc. (hereinafter referred to as Commercial) on June 18, 1979 wherein Commercial requested that:

a) The Commission clarify the primary and secondary service area definitions utilized in the subject order and that the Commission further state the Cities of Rock Springs, Evanston, Rawlins, Green River and the area known as Hogsback Ridge are not within certificated service area of Industrial from the Marsh Peak transmitter site;

b) The Commission should specifically state that no radio common carrier operating within the State of Wyoming is entitled to exclusive use of any channel throughout its secondary service area;

c) The elements of business compulsion were present as evidenced by the testimony and evidence of record and that the Commission finding no such evidence existed is contrary to the evidence of record;

d) The Commission finding at Page 10, Paragraph 16(b) was in error as Commercial had submitted to the jurisdiction of the Wyoming Commission; and

e) The language at Page 12, Paragraph 16(c) is confusing as to which utility is entitled to use certain channels in the VHF spectrum.

4. On the 29th day of June, 1979, the Commission served each party with a copy of the corresponding party's Petition, according each the opportunity to file an answer to said Petition within ten (10) days of service. Industrial filed an Answer to the Petition of Commercial on July 9, 1979; Commercial elected not to file an Answer to the Petition of Industrial.

5. Both parties have questioned primary and secondary serrvice contours outlined by the Commission, Industrial arguing that contours should have been provided for proposed transmitter sites on Aspen Mountain and Hogsback Ridge, and Commercial asserting the definitional basis is insufficient as the Commission should specifically state the Marsh Peak transmitter contours will not encompass Rock Springs, Evanston, Green River, Rawlins and Hogsback Ridge. Concerning the position of Commercial, the Commission is unable to find any vague, misleading, contradictory, inconsistent or confusing language in the contour grants as outlined in the subject order. The order is plain and unambiguous on its face and requires no further clarification herein.

The corresponding issue of Industrial concerns the alleged loss of authorized transmitter locations on Aspen Mountain and Hogsback Ridge. These locations were generally mentioned in the 1977 hearing (Transcript p. 582) as "Where we [Industrial] would intend to install repeater facilities.", and the Aspen Mountain site was further defined as a possible transmitter site, depending on coverage from Marsh Peak, Rawlins and Evanston. As these locations are apparently contingent in both time and circumstance, the Commission cannot grant contours for said facilities. Special allowance has already been made for the transmitter near Evanston; further contour grants as requested by Industrial would be an abuse of discretion and contrary to accepted regulatory principles.

6. Industrial also objects to the proported loss of Sublette County as an authorized service area. The Commission's Notice and Order setting this matter for hearing, dated December 1, 1978, specifically provided that:

> "...due to the nature of each party's petition in this matter, each party shall consider their respective certificate grants to be in question and shall direct

> their evidence to include consideration of this point."

And at Paragraph 3(c) of said Notice, the Commission also stated:

> "(c) Both parties shall be under the same burden of producing sufficient evidence to show why their respective certificates of November 29, 1977 should not be revoked, altered or amended in any manner as required in the public interest."

The Order under consideration herein dealt specifically with Sublette County in Paragraphs 14 and 15, and disposition was made in accordance with the Notice provisions noted above. As Industrial has failed to produce further evidence contrary to the position taken by the Commission in the subject Order with regard to Sublette County, the argument of Industrial in its Petition for Rehearing concerning Sublette County is rejected as without merit.

7. The Petition for Rehearing of Commercial raised the argument that the Commission should specifically state that no RCC operating within the State of Wyoming is entitled to exclusive use of any channel in the utility's secondary service area regarding any particular channel. The present Order for consideration herein at Paragraph 14 specifically stated that secondary service areas are considered non-exclusive; further clarification is not necessary as this provision is plain and unambiguous on its face. In accordance with this finding, the argument of Commercial for further definition as to secondary service area is rejected without form and substance.

8. The final series of issues raised by Industrial concerns the channel allocations made by the Commission at Page 12 of the subject Order and the Commissions position on "wide area coverage". Commercial has also taken excep-

tion to the channel preferences detailed in the subject Order, questioning prospective use of all VHF channels in southwestern Wyoming. The Commission acknowledges the language contained in Paragraph 16(c) may be somewhat confusing and that further explanation is prudent. The Order presently under consideration would appear to grant Commercial the exclusive use of Channels 1 and 9 in southwestern Wyoming, an action which is clearly contradictory to the non-exclusive intent stated previously for primary and secondary service areas. The specific provision under consideration states that, "The Commission finds Commercial should be entitled to operate on VHF Channel 1 and 9 in the Rock Springs, Green River, Evanston and LaBarge areas, and that Industrial should continue operations on its existing Channels 3, 5, 7, 11 and 13.". In keeping with the non-exclusive nature of certificate grants made by this Commission pertaining to RCC operations, the foregoing language should not be construed to require or compel the abandonment of any FCC action concerning channel utilization in southwestern Wyoming. When construed in pari materia with the other provisions of the subject order, it is apparent the referenced language is not designed to provide exclusive use of any channel to either carrier. Accordingly, the channel preferences detailed at Paragraph 16(c) of the Order under consideration herein are to be deemed an apparent solution to the problem and not an exclusive allocation to either party. As noted previously in the definitions pertaining to primary and secondary service areas, the channels utilized by each carrier are non-exclusive in nature, open to simultaneous utilization by any other carrier, provided said utilization will not result in excessive channel interference.

The Commission has never embraced or endorsed the concept of wide area coverage as such is contradictory to non-exclusive utilization of existing channel frequencies. The Commission shall continue to reject any wide area coverage concept by any utility when such is based upon exclusive use of channels.

9. Commercial has again restated its argument pertaining to business compulsion, it has failed to produce any evidence indicating such was not considered by the Commission in the deliberations resulting from the Order under consideration herein. Commercial has also failed to produce any new evidence to reinforce its argument concerning business compulsion. In the absence of such evidence, the Commission must again reject the business compulsion argument as expoused by Commercial.

10. The Commission acknowledges the error noted by Commercial Communications in its Petition for Rehearing pertaining to Paragraph 16(b). The Commission shall strike the following sentence from the official Order of the Commission:

> "While there is merit to the argument of Commercial, it is tainted by the fact Commercial has also failed to submit to the ju isdiction of this Commission as evidenced by its FCC filing for Channels 3 and 7 in Rock Springs."

CONCLUSIONS OF LAW

1. W.S. 37-2-214 (1977) provides in part:

> "At any time after an order has been made by the Commission any person interested therein may apply for a rehearing in respect to any matter determined therein and the Commission shall grant and hold such rehearing if in its judgment sufficient reason therefore be made to appear, which rehearing shall be subject to such rules as the Commission may prescribe."

The Commission interprets the above quoted statute to mean that it may exercise discretion in deciding whether to grant a rehearing in this matter.

2. The Petitions for Rehearing under consideration herein were timely filed in accordance with W.S. 37-2-214 and Commission Rules.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Petitions for Rehearing as filed by Commercial Communications, Inc. and David R. Williams d/b/a Industrial Communications be, and the same are hereby denied.

2. The time provisions of the subject order shall be tolled until the date of issuance of this order.

3. This order shall become effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this 29th day of August, 1979.

PUBLIC SERVICE COMMISSION OF WYOMING Chairman Johnson was transacting other Commission business and was not available to sign this order on the date set out above
C.E. JOHNSON, Chairman
JOHN R. SMYTH, Commissioner
G. KEITH OSBORN, Commissioner

(SEAL)

ATTEST:

JON R. FORWOOD
Assistant Secretary

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AKTICLE I

Section 8.

... To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

ARTICLE VI.

Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

COMMUNICATIONS ACT OF 1934

47 U.S.C. § 301

SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO

PART I. GENERAL PROVISIONS

§ 301. License for radio communications or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to

provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. June 19, 1934, c. 652, Title III, § 301, 48 Stat. 1081.

APPENDIX D

BEFORE THE PUBLIC SERVICE COMMISSION
OF WYOMING

DOCKET NO. 9604
SUB 1

IN THE MATTER OF THE APPLICATION OF COMMERCIAL COMMUNICATIONS, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO INITIATE AND OPERATE MOBILE RADIO-TELEPHONE SERVICE IN THE CITIES OF RAWLINS, EVANSTON AND SURROUNDING AREAS, AND ONE-WAY PAGING SERVICE IN THE CITY OF EVANSTON AND SURROUNDING AREA.

DOCKET NO. 9639
SUBS 1 and 2

IN THE MATTER OF THE APPLICATION OF WESTERN RADIO COMMUNICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO INITIATE AND OPERATE MOBILE RADIO-TELEPHONE SERVICE AND ONE-WAY POCKET PAGING SERVICE IN AND AROUND RAWLINS, WYOMING.

DOCKET NO. 9600
SUB 1

IN THE MATTER OF THE APPLICATION OF RULE RADIOPHONE SERVICE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AND MAINTAIN MOBILE RADIO-TELEPHONE AND ONE-WAY PAGING SERVICES TO THE PUBLIC IN AND AROUND RAWLINS, WYOMING.

DOCKET NO. 9661

IN THE MATTER OF THE APPLICATION OF DAVID R. WILLIAMS D/B/A INDUSTRIAL COMMUNICATIONS FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AND FURNISH TWO-WAY MOBILE RADIO-TELEPHONE, DISPATCH AND PAGING COMMON CARRIER SERVICE TO ALL OR PARTS OF LINCOLN, UINTA AND SWEETWATER COUNTIES WYOMING.

APPEARANCES

ARTHUR KLINE, of Kline and Swainson, Attorneys at law; and JOHN B. GRABILL, Attorney at Law, of Cheyenne, Wyoming, appearing for the Applicant Commercial Communications, Inc.

RONALD P. JUROVICH, Attorney at Law, of Thermopolis, Wyoming, appearing for the Applicant Western Radio Communications.

CAREY AUBURN, III, Attorney at Law, of Laramie, Wyoming and GEORGE JENSEN, Attorney at Law, of Cheyenne, Wyoming, appearing for Applicant Rule Radiophone Service, Inc.

WARD A. WHITE, of Guy, Williams and White, Attorneys at Law, of Cheyenne, Wyoming, and WALTER P. FABER, JR., and MICHAEL A. NEIDER, of Watkins and Faber, Attorneys at Law, of Salt Lake City, Utah, appearing for the Applicant Industrial Communications.

JOHN D. TROUGHTON, of Troughton and Vehar, Attorneys at Law, Kemmerer, Wyoming, appearing for the Protestant-Intervenor, Union Telephone Company.

W. DOUGLAS HICKEY, of Hirst and Applegate, Attorneys at Law, Cheyenne, Wyoming, appearing for the Protestant-Intervenor Mountain States Telephone and Telegraph Company.

HEARD BEFORE

CHAIRMAN C.E. JOHNSON, DEPUTY CHAIRMAN JOHN R. SMYTH and COMMISSIONER G. KEITH OSBORN. COMMISSIONER OSBORN presiding.

FINDINGS, CONCLUSIONS AND ORDER

This consolidated matter is before the Public Service Commission of Wyoming for consideration of the several applications by the Applicants referenced herein above for certificate authority to provide interconnected radio common carrier service in southwestern Wyoming. The Commission, after having considered the several applications, the testimony and evidence presented at the public hearing held in this matter, and the stipulation executed by all parties, being duly advised in the premises, FINDS and CONCLUDES:

FINDINGS OF FACT

1. On January 28, 1977, Commercial Communications, Inc. (hereinafter referred to as Commercial) filed an application with the Public Service Commission of Wyoming for authority to provide interconnected mobile radio-telephone and one-way pocket paging service to Evanston and mobile radio-telephone service to Rawlins on both UHF and VHF channels. A Notice of Application was published once a week for three consecutive weeks in the Uinta County Herald and the Rawlins Daily Times, starting the week of February 8, 1977. Mountain States Telephone and Telegraph Company filed a protest to the application, stating it

would resist any exclusive grant of authority. Union Telephone Company filed a protest of February 23, 1977, and later filed a Petition for Leave to Intervene on March 14, 1977. Rule Radiophone Service filed a protest against the application on February 28, 1977, and Two-Way Radio Service, Inc. also filed a protest on that date, but such was later withdrawn on March 10, 1977. David R. Williams d/b/a Industrial Communications filed a protest and Petition for Leave to Intervene on February 28, 1977. A protest was also filed by Utah-Wyoming Telephone Company and Cokeville Telephone Company on March 1, 1977, the substance of which was a protest against market encroachment. The Commission granted Industrial Communications, Union Telephone Company, and Western Radio Communications authority to intervene in that portion of the hearing pertaining to the application by Commercial Communications. On August 16, 1977, Commercial filed a Petition for Leave to Amend its Application to include one-way paging in the Rawlins area. The Commission granted the amendment on August 17, 1977 as it determined the omission was minor and would not have a prejudicial effect upon the other applicants.

2. On February 24, 1977 Western Radio Communications (herein referred to as Western) filed an application with this Commission in Docket No. 9639 Sub 1 for authority to provide interconnected UHF mobile radio-telephone service to Rawlins, Wyoming and the surrounding area. In Docket No. 9639 Sub 2, Western filed an application for VHF one-way pager service in the Rawlins area, and in 9639 Sub 3, Western requested interconnected UHF mobile radio-telephone and one-way pager service to Evanston, Wyoming and the surrounding area. The Commission published a Notice of Application once a week for two consecutive weeks in the Rawlins Daily Times and the Uinta County Herald, beginning the week of March 8, 1977. In response to this notice, a protest and/or Petition to Intervene was filed by the following parties: David R. Williams d/b/a Industrial Com-

munications, Rule Radiophone Service, Union Telephone Company, Commercial Communications, Inc. and Mountain States Telephone and Telegraph Company. The Commission granted the Petitions for Leave to Intervene of Industrial Communications, Union Telephone Company, and Commercial Communications on July 15, 1977.

3. Rule Radiophone Service (hereinafter referred to as Rule) filed an application with this Commission on February 28, 1977 for certificate authority to provide manually operated VHF mobile radio-telephone and one-way paging service to Rawlins, Wyoming and surrounding areas. The application was published through a Notice of Application once a week for two consecutive weeks in the Rawlins Daily Times, beginning the week of March 8, 1977. A protest to the application was filed by Mountain States Telephone and Telegraph Company, stating that it opposed any exclusive grant of authority to Rule. A protest and Petition for Leave to Intervene was filed by Commercial Communications on March 29, 1977, and an Order granting intervention was issued by the Commission on July 15, 1977. Western Radio Communications of Casper, Wyoming petitioned for an was granted Leave to Intervene in the action on August 25, 1977.

4. David R. Williams d/b/a Industrial Communications (hereinafter referred to as Industrial) filed an application with this Commission on February 21, 1977 for certificate authority to provide VHF mobile radio-telephone and one-way paging service to all or parts of Lincoln, Uinta and Sweetwater Counties, Wyoming. The Commission issued a Notice of Application for publication in the Uinta County Herald and the Rock Springs Daily Rocket-Miner, such to run once a week for two consecutive weeks beginning March 15, 1977. In response to the Notice of Application, a protest and Petition for Leave to Intervene was filed by Union Telephone Company and Commercial Communications, Inc., individually, said requests being granted on July 15, 1977. Mountain States Telephone and Telegraph Company filed a

protest to the application whereby it stated it would resist any exclusive grant of authority given to applicant, Rule. On August 22, 1977, Industrial Communications filed a Petition for Leave to Amend its application to include Sublette and Carbon Counties, Wyoming. The Commission denied the petition in an order dated August 25, 1977, but in response to a motion made by Industrial in the pre-hearing conference held August 29, 1977, the Commission allowed Industrial to present evidence pertaining to Sublette and Carbon County.

5. On the 29th day of July, 1977, the Commission entered its Notice and Order Setting Hearing in this matter, such to be held at 9:00 a.m. on August 29, 1977 in the hearing room of the Hath Cheyenne, Wyoming. This notice was published once a week for three consecutive weeks in the Kemmerer Gazette, the Rock Springs Daily Rocket-Miner, the Rawlins Daily Times, and the Uinta County Herald, newspapers of general circulation printed and published within the service area under consideration herein.

6. A public hearing was held on September 20, 1977, for the purpose of receiving testimony and evidence from the applicants and any interested person(s). Each applicant appeared through Wyoming counsel as noted hereinabove and fully participated in the proceedings. There were no other protestants or intervenors to the consolidated proceeding.

7. At the pre-hearing conference held August 29, 1977, Western withdrew its Sub 3 application for certificate authority to the Rawlins area. The parties of interest also agreed to a stipulation presented by Mountain Bell that any authority granted as a consequence of the proceedings be non-exclusive in nature.

8. In this consolidated proceeding, the Commission had the following broad issues for consideration:

a) The financial ability and technical knowledge and experience of each applicant to operate as a radio common carrier;

b) The ability of each market area to support radio common carrier operations;

c) The impact of market expansion upon current subscribers to each respective applicant's system;

d) Whether multiple certification is in the public interest; and

e) The justness and reasonableness of each applicant's proposed rate structure.

9. Each of the above named applicants produced sufficient evidence, through testimony and exhibits, to support a finding that each has the requisite financial and technical ability to provide radio common carrier service to the public in the area under consideration herein.

10. Each of the above named parties entered into a stipulation on September 1, 1977 whereby each withdrew from the case of all opposing applicants and stipulated to the public need throughout the area for each respective applicant in a particular service area. Each of the applicants further stipulated that the service to be offered and market covered by each differs materially from the service and markets of each of the others, and in furtherance of this stipulation, each applicant agreed to provide service to a particular group of customers as shown in the stipulation attached hereto as Appendix A, Paragraph 9.

11. Commercial Communications, Inc., David R. Williams, d/b/a Industrial Communications and Union Telephone Company, by and through their respective legal counsel executed a "Stipulation of Facts and Statement of

Disputed Issues," attached hereto as Appendix B, through which the parties specified various issues which were controverted by the parties, the resolution of which was left to the Commission. Accordingly, the Commission finds that Union Telephone Company is not entitled to receive or realize any revenue under its existing separation agreement with Mountain States Telephone and Telegraph Company for toll calls originating within its certificated area by subscribers of Industrial Communications and Commercial Communications which do not utilize Union's long-line facilities. Further, the Commission finds the position asserted by Industrial Communications and Commercial Communications with respect to market need, nature of service, and Federal Communications Commission (FCC) practice pertaining to radio common carriers is correct and complies with the policy and practice of this Commission. (See Appendix B, page 6).

12. Union Telephone Company shall be entitled to receive a share of toll revenue only when a subscriber of Commercial Communications or Industrial Communications utilizes Union Telephone facilities, thereby making Union the "originating station".

13. The Commission shall accept the determination of each respective applicant that there is a sufficient market to support the various service areas as expressly provided in the stipulation executed by all parties on September 1, 1977. Further, the Commission finds that such expansion will not have an adverse impact upon existing subscribers of each respective applicant.

14. The rate and tariff structure as proposed by each applicant excepting Industrial appears reasonable to this Commission when compared to those generally established in the industry. The tariff structure of David R. Williams d/b/a Industrial Communications as submitted in the late-filed exhibit dated September 19, 1977 whereby the tariff

provision pertaining to extra call charges was removed shall be accepted by this Commission. The Commission reserves the right to order any change in the rate structure of any and all applicants should such become unreasonable at a future time.

15. The Commission recognizes the fact that due to the very nature of radio common carriers, a precise service area cannot effectively be defined by metes and bounds measurements in a manner similar to that defined by the Commission for electric, telephone and gas utilities. Therefore, the Commission shall adhere to the two-part definition of service area as expounded in the *Bird-Brownell* Order in Docket Nos. 9658, 9658 Sub 1, and 9438 Sub 2 whereby two specific types of service areas were creased:

a) *Primary Service Area:* that non-exclusive area enclosed within the particular DBU contour as defined in Section 21-504 of the F.C.C. Rules and Regulations wherein, theoretically, radio signals can be received with a reliability factor of 90%.

b) *Secondary Service Area:* that non-exclusive area outside the primary service area but within which a subscriber may be able to obtain utility service of varying reliability.

16. The Commission shall accept the stipulation executed by all parties on September 1, 1977 whereby certain service areas were designated to each applicant by mutual agreement. Acceptance of this stipulation by the Commission shall constitute a grant of authority to each applicant to provide radio common carrier service to the area under consideration herein on a competitive basis, with each applicant having the responsibility to provide reliable utility service within his primary service area as specifically outlined within the stipulation. a monopoly right within his "primary service area" as defined hereinabove, as such a grant

would be impossible due to the very nature of radio common carrier service. It is the determination of this Commission that proceeding in such a manner is in the public interest, and shall provide any potential subscriber the best possible utility service that is most suited to his particular needs.

17. The issuance of a Certificate of Public Convenience and Necessity to each applicant herein for authority to provide radio common carrier service as outlined in each respective application and amendment thereto is in the public interest.

CONCLUSIONS OF LAW

1. Pursuant to W.S. 37-1(f)(ii) the Commission has jurisdiction over all matters pertaining to radio common carriers within the State of Wyoming.

2. The application of each applicant was filed in accordance with Commission Rules.

3. Pursuant to 37-51 *et. seg.*, this Commission has jurisdiction over the rates charged and proposed to be charged by each respective applicant.

4. Proper notice of the public hearing held in this natter was given in accordance with W.S. 9-276.25.

5. Pursuant to W.S. 9-276.25(1), this Commission may accept a stipulation in any contested case as a means of disposing of the matters included therein.

6. Each applicant has shown that it possesses the necessary qualifications under law to implement the service proposed in his particular application and amendments thereto, and that such service will benefit the public convenience and necessity.

7. Each applicant should be granted a Certificate of Public Convenience and Necessity to provide the services proposed in its particular application and amendments thereto.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. The applications and amendments thereto of Commercial Communications, Inc., Western Radio Communications, Rule Radiophone Service, Inc., and David R. Williams d/b/a Industrial Communications for a Certificate of Public Convenience and Necessity to operate and furnish radio common carrier service to the particular service areas as outlined in the stipulation of September 1, 1977, incorporated herein by reference, be, and the same are hereby approved.

2. Each applicant shall file his proposed rates, charges, rules and regulations for the service herein approved, such to become effective 24 hours after receipt by the Commission or unless otherwise ordered by this Commission.

3. Each applicant is hereby ordered to diligently seek and acquire F.C.C. authority to furnish the radio common carrier service herein approved, with the condition that all operations shall commence within one year after receipt of F.C.C. approval.

4. The protests of Mountain States Telephone and Telegraph Company against the grant of exclusive authority to any applicant in the service area under consideration herein be, and the same is hereby acknowledged, and the authority granted herein is not exclusive and does not preclude Mountain States Telephone and Telegraph Company from providing a similar type of service in the certificated area of each of the applicants.

5. Each and every applicant shall remain subject to the jurisdiction of the Wyoming Public Service Commission for intrastate activities and shall comply with the rules and regulations of the Commission and the laws of the State of Wyoming.

6. This order shall be effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this day of November, 1977.

PUBLIC SERVICE COMMISSION
OF WYOMING

C.E. JOHNSON, Chairman
JOHN R. SMYTH, Commissioner
G. KEITH OSBORN, Commissioner

(SEAL)

ATTEST:

JON R. FORWOOD, Assistant Secretary

BEFORE THE PUBLIC SERVICE COMMISSION
OF WYOMING

Doc. No. 9604
Sub 1

IN THE MATTER OF THE APPLICATION OF COMMERCIAL COMMUNICATIONS, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO INITIATE AND OPERATE MOBILE RADIO-TELEPHONE SERVICE IN THE CITIES OF RAWLINS, EVANSTON AND SURROUNDING AREAS, AND ONE-WAY PAGING SERVICE IN THE CITY OF EVANSTON AND SURROUNDING AREA.

Doc. No. 9639
Subs 1 & 2

IN THE MATTER OF THE APPLICATION OF WESTERN RADIO COMMUNICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO INITIATE AND OPERATE MOBILE RADIO-TELEPHONE SERVICE AND ONE-WAY POCKET PAGING SERVICE IN AND AROUND RAWLINS, WYOMING.

Doc. No. 9690
Sub 1

IN THE MATTER OF THE APPLICATION OF RULE RADIOPHONE SERVICE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AND MAINTAIN MOBILE RADIO-TELEPHONE AND ONE-WAY PAGING SERVICES TO THE PUBLIC IN AND AROUND RAWLINS, WYOMING.

Doc. 9661

IN THE MATTER OF THE APPLICATION OF DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AND FURNISH TWO-WAY MOBILE RADIO-TELEPHONE DISPATCH AND PAGING COMMON CARRIER SERVICE TO ALL OR PARTS OF LINCOLN, UINTA AND SWEETWATER COUNTIES, WYOMING.

STIPULATION

The above applicants, Commercial Communications, Inc., by and through its president, Daniel E. Christopherson, and its legal counsel, John B. Grabill in Docket No. 9604 Sub 1; Rule Radiophone Service, Inc., by and through its president, Robert R. Rule, and its legal counsel, Cary R. Alburn III in Docket No. 9600 Sub 1; Western Radio Communications, by and through its president, Steven D. Schilling, and its legal counsel, Ronald Jurovich in Docket No. 6939 Sub 1 and Sub 2; and David R. Williams d/b/a/ Industrial Communications, by and through David R. Williams. and his legal counsel, Ward A. White, Walter P. Faber, Jr. and Michael A. Neider in Docket No. 9661, hereby agree and stipulate as follows:

1) Each of the above applicants agrees that this stipulation shall be fully binding under the terms and conditions stated herein upon each and shall be entered into and become a part of the record and transcript of each of the cases identified by the respective Docket No. stated in the caption hereof presently pending before the Wyoming Public Service Commission.

2) Each of the above applicants agrees and stipulates that each shall and does hereby withdraw as a protestant and/or intervenor, as the case may be, in and to the applica-

tion and requested amendments of each of the others in the respective Docket No. and case, and further agrees and stipulates that each could have and is hereby considered as having furnished sufficient evidence to justify and warrant the complete granted of the respective application and requested amendments thereto 2by having the Wyoming Public Service Commission, except as specifically limited herein.

3) Each of the above applicants agrees and stipulates that each has shown and can show the requisite public need for the mobile radio telephone and paging service as proposed by each in its above numbered applications and requested amendments thereto in the respective Docket No. and case before the Wyoming Public Service Commission.

4) Each of the above applicants agrees and stipulates that each is willing, is able and has shown and can show financial ability and technical knowledge and experience to operate as a radio common carrier to furnish to the public on a continuous basis the service applied for by each in the areas described in the respective Docket No. and case presently pending before the Wyoming Public Service Commission.

5) Each of the above applicants agrees and stipulates that there is sufficient total public need for the service of each in the areas applied for because of the uniqueness of those areas and that the Wyoming Public Service Commission would be fully justified in granting to each applicant the application and requested amendments as identified by the respective Docket No. stated above.

6) Each of the above applicants agrees and stipulates that the service to be offered and market covered by each differs materially from the service and market of each of the others.

7) Each of the above applicants agrees and stipulates

to provide the public served by each with adequate, safe and modern service and equipment as stated and outlined in its or his respective application and requested amendments thereto.

8) Each of the above agrees and stipulates that each has fully discussed, reviewed and considered the impact on the public of the proposed service of each and believes and agrees that public convenience and necessity would be materially benefitted by the certification of each for the reason that continued conflict between the applicants would deprive the public for an extended period of the use and benefit of radio common carrier service in areas not adequately served at the present time. In addition, the applicants have mutually agreed that should the Wyoming Public Service Commission grant the respective applications and requested amendments thereto as stated herein, that they will cooperate in the operation of their services as outlined herein in such a fashion as to increase materially the public's convenience and necessity in the areas applied for by each. Each applicant agrees that Commercial's direct case on the record is not prejudiced by the matters stipulated herein.

9) Each of the above applicants agrees and stipulates that the application and requested amendments of each as stated above should be granted under the following terms and conditions:

(a) Rule Radiophone Service, Inc. shall forthwith apply to the FCC for a construction permit and license for VHF mobile channel 5 (frequency 152.09 MHz) and VHF paging channel P-5 (frequency 152.24 MHz) and shall use said channels only for the service of the regular residents and citizens of Rawlins and Sinclair, Wyoming not engaged in the exploration for, production of, or regular service to the gas, oil and energy industry

in the area outside the metropolitan areas of Rawlins and Sinclair, Wyoming. The transmitter and antenna for VHF mobile channel 5 (frequency 152.09 MHz) shall be of reduced power as required to prevent interference with existing VHF channel 5 systems and made directional in a slightly easterly pattern to cover Rawlins and Sinclair, Wyoming. None of the other applicants shall protest Rule's application to the FCC for said channels. So long as Rule continues and operates a going business in Rawlins and Sinclair, Wyoming as described and limited herein and provides the dispatch service to Commercial and Williams described below in subparagraph (b), Commercial and Williams shall not use any frequency to page into Rawlins or Sinclair, Wyoming except as their outside or oil field subscribers may infrequently need paging.

(b) Rule agrees to implement radio dispatch service in Rawlins as soon as possible and thereafter to provide adequate and timely radio dispatch service on modern equipment to the subscribers of the service of Commercial and Williams at a cost no higher than the rate charged to Rule's most preferred customer.

(c) Western Radio Communications shall forthwith apply to the FCC for a construction permit and license for two UHF channels and the one VHF paging channel (P-6) for use in downtown Rawlins only, and shall use all due diligence and effort to acquire and put the same into operation as soon as possible under the terms and conditions stated in its application identified by the Docket No. stated above except as restricted in subparagraph (a) above. None of the other applicants will protest the application of Western to the FCC for said

channels. Western shall not use any VHF mobile channels for its service in Carbon County, Wyoming. Western shall have three years from the date of this stipulation in which to offer any UHF service in the Rawlins, Wyoming service area before any other applicant shall install interconnected UHF service in said service area. If Western applies for more than two UHF channels within the said three year period, none of the above restrictions in this paragraph shall have force or effect.

(d) Commercial Communications, Inc. and David R. Williams will jointly apply to the FCC for a construction permit and license for VHF channel 7 (frequency 152.120 MHz) for Carbon County, Wyoming, and shall share equally in the cost of obtaining and installing said channel, operating said channel and the use of said channel. Neither Commercial nor Williams shall use said channel during any period so as to prevent the use by the other of one-half of the channel time during such period. None of the other applicants shall protest Commercial's and Williams' application to the FCC for said channel.

(e) Commercial and Williams shall within three weeks from the date hereof arrange to meet in Evanston, Wyoming to study and determine if any interference will occur to either because of the use of VHF channels 1 and 9 in that area. If it is determined that undue interference will occur, Commercial and Williams agree to work out a solution and agree that any such interference will be deemed to be caused equally by the operations of both and shall be equally the responsibility of both. This shall be construed to require a change in effective radiated power or antenna direction of any presently existing transmitters.

(f) Each applicant shall receive authority as requested in each individual application and requested amendments thereto except as limited in this stipulation.

10) This stipulation shall be considered as the request and motion by each applicant in the respective Docket No. and case of each to the Wyoming Public Service Commission to grant the respective applications together with requested amendments for certificate of public convenience and necessity as stated herein.

11) If the Wyoming Public Service Commission does not grant the certificate to each as stated and defined herein, this stipulation shall not be binding on the applicants and shall be null and void, otherwise this stipulation should remain in effect until further order of the Wyoming Public Service Commission or as otherwise provided herein.

12) Williams agrees and stipulates that, by reason of his subject applications filed under Docket No. 9661 and all other future applications, if any, involving intrastate operations, he recognizes that the Wyoming Public Service Commission shall have jurisdiction over all intrastate matters with respect to radio common carrier service by way of Wyoming statutory authority excluding those matters preempted by federal statutes, rules, regulations and decisions.

The above Stipulation is executed by the above applicants and their legal counsel this 1st day of September, 1977.

COMMERCIAL COMMUNICATIONS, INC.
By Daniel E. Christopherson
President

By John B. Grabill
Its Attorney

RULE RADIOPHONE SERVICE, INC.
By Robert R. Rule
President

By Cary R. Auburn III
Its Attorney

WESTERN RADIO COMMUNICATIONS
By Steven D. Schilling
President

By Ronald Jurovich
Its Attorney

DAVID R. WILLIAMS
d/b/a INDUSTRIAL COMMUNICATIONS
By David R. Williams

By Ward A. White
His Attorney

By Walter P. Faber, Jr.
His Attorney

By Michael A. Neider
His Attorney

APPENDIX E

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF WYOMING

Docket No. 9661
SUB 1

IN THE MATTER OF THE FORMAL FORMAL COMPLAINT OF COMMERCIAL COMMUNICATIONS, INC. AGAINST DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS AND THE PETITION OF COMMERCIAL FOR AN ORDER CANCELING THE OPERATING AUTHORITY THE OPERATING AUTHORITY OF INDUSTRIAL

AND

IN THE MATTER OF THE COUNTER PETITION OF DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS FOR AN ORDER DIRECTING COMMERCIAL COMMUNICATIONS TO COMPLY WITH THE ORDER OF THE PUBLIC SERVICE COMMISSION OF WYOMING DATED NOVEMBER 29, 1977.

CLOSING ARGUMENT OF INDUSTRIAL COMMUNICATIONS

Industrial Communications respectfully submits the following points and authorities as requested by the Commission:

BACKGROUND FACTS

1. Commercial was represented at the application for authority hearing in August, 1977 by two separate attorneys (T.353) who participated and advised Commercial in the

negotiations prior to the signing of the stipulation of settlement by all parties. (T.355)

2. As the 1977 hearing progressed and evidence was presented Commercial's attorneys believed Commercial's alternatives became more limited, all of which was discussed with Mr. Christopherson. (T.248-49) (T.271-72)

3. Prior to signing the stipulation, Commercial and its attorneys discussed the possibility and were concerned that Commercial's application might be denied. (T.353, 357, 273)

4. Commercial's attorneys differed with each other as to whether Commercial should sign the stipulation and discussed the matter with Mr. Christopherson. (T.344)

5. Commercial considered appealing an unfavorable decision by the Commission. (T.278)

6. One of Commercial's attorneys signed and one refused to sign the stipulation which requested that Commercial's application be granted. (T.224)

7. All parties and their counsel were involved in the negotiations, made suggestions of settlement (T.272) and ultimately requested the Commission to accept the stipulation, which the Commission did after reviewing the matter in detail with the parties in open hearing. The Commission incorporated the stipulation in its order issued in November, 1977. See Wyoming Public Service Commission Order Docket 9661.

8. The stipulation provided for and Commercial received the authority requested in its application. (T.358, 272)

9. The stipulation recognized that Industrial had previously filed with the FCC for VHF mobile radio channels 1 and 9 in Evanston, Wyoming. (T.345, 545)

10. According to Mr. Grabill (and contrary to Commercial's present contention), Mr. Christopherson was apparently happy with the stipulation two or three weeks after he signed it. (T.292)

11. Thereafter, notwithstanding the stipulation, Mr. Christopherson threated to file on channels 1 and 9 in Evanston or on some of the other VHF channels Industrial had in service on Marsh Peak. (T.347)

12. When Commercial filed on channels 1 and 9 in October, 1977, Mr. Christopherson represented to the FCC that Mr. Williams had previously agreed to withdraw Industrial's application for those channels but had later denied the agreement. (T.343)

13. Mr. Christopherson apparently remembered things differently later because he testified in this hearing that the stipulation broke down because of the February, 1978 agreement and not because of any earlier event. (T.369-70)

14. Commercial's filing on channels 1 and 9 delayed the FCC grant of such channels to Industrial and thus delayed service to the public in that area. (T.354)

15. There were a number of UHF channels available for use in the Evanston area at the time Commercial filed on VHF channels 1 and 9. (T.349)

16. Industrial has been operating 5 VHF channels from Marsh Peak for a number of years serving persons operating in several southwestern Wyoming counties listed in Industrial's application to the Commission. (T.450, 136)

17. Industrial was furnishing such service prior to the time Commercial began offering service on its channels. (T.308, 136)

18. Commercial has FCC authority to operate two VHF and three UHF channels in southwestern Wyoming and presently has said channels in operation. (T.150)

19. Dr. Schrenk, who has rendered professional mobile radio engineering services to both Commercial and Industrial, stated that there is no practical operating difference between UHF and VHF systems although VHF mobile equipment cannot be used on UHF channels and vice versa. (T.457-58)

20. The quality, power and utility of mobile units have been substantially improved since 1952 when the data on which the Carey Report is based was compiled. (T.635)

21. Consideration of the power and movement of the mobile unit is essential to the operation of a wide area mobile radio system. (T.535-37)

22. There are a number of UHF channels presently available for use in southwestern Wyoming. (T.134)

23. The FCC has granted power waivers to both Industrial and Commercial in regard to certain aspects of their transmitting services. (T.634-35)

24. The operation in southwestern Wyoming by others on the same mobile radio channels Industrial is operating on Marsh Peak would seriously degrade Industrial's present service to the public in southwestern Wyoming for which service the FCC has granted a power waiver and for which service Industrial has received authority from this Commission. (T.451-52, 582-86)

25. Commercial has now filed for various locations in southwestern Wyoming FCC applications on several channels operated by Industrial on Marsh Peak. (T.546)

26. The present operations of Commercial and Industrial do not cause interference to each other.

27. The principal dispute between Commercial and Industrial is centered on the prospective use by either of the channels presently operated by the other.

ISSUES

There are three basic issues left for resolution:

(a) Whether Commercial was unlawfully coerced into signing the Stipulation of September 1, 1977.

(b) Whether either of the parties has not complied with the said stipulation and with the Commission's order based on the stipulation.

(c) What can and ought the Commission do to insure the required service to the public in southwestern Wyoming.

DISCUSSION

POINT I. COMMERCIAL WAS NOT COERCED INTO SIGNING THE STIPULATION.

Contray to Commercial's present position, Mr. Christopherson apparently pleased with the stipulation shortly after the hearing. (See Mr. Grabill's comment T.292). Also, Mr. Christopherson answered Mr. Forwood that the stipulation broke down during the attempt to settle the dispute in February, 1978 with the agreement prepared by Jeremiah Courtney. (T.369-70).

Even if Commercial had been unhappy with the stipulation, Commercial has no grounds to complain. Commercial was presented by legal counsel during the entire hearing in 1977 which culminated in the stipulation. Commercial's

counsel was involved in the negotiations with all other counsel and parties. The law is clear that there can be no duress or business compulsion when the contracting party has had opportunity to consult legal counsel. In this case Commercial not only had the opportunity but was in fact represented by and consulted at length with legal counsel. See *Smith v. Lenchner,* 205 A.2d 626 (Pa. 1967); *Carrier v. William Penn Broadcasting, Co.,* 233 A.2d 519 (Pa. 1967); *Hastain v. Greenbaum,* 470 P.2d 741 (Kan. 1970); *Three Rivers Motor Co. v. Ford Motor Co.,* 522 P.2d 85 (3rd Cir. 1975).

The Pennsylvania Appellate Court stated in the *Carrier* case that:

> Not only did the corporate officers have the opportunity to consult with counsel, but the counsel actually carried on the negotiations... Defendant signed the instant note with the full advice of counsel. We are not impressed with its efforts to avert the effects of its bargain. 233 A.2d at 522.

Similarly, the Supreme Court of Kansas in the *Hastain* case found no business compulsion or duress where the complaining party had signed a promissory note upon the advice of his own independent counsel.

It is clear that mere advice, argument or persuasion does not constitute duress or undue influence if the complaining person acts freely even though he would not have acted except for the advice, argument or persuasion. *Prontzinski v. Baker,* 4 N.E.2d 862 (Ill.) Also see *Maloy v. Bemis Bros. Bag Co.,* 174 F. Supp. 785 (D.C.N.H.) Thus, even if the stipulation had been burdensome to Commercial, which it was not, it would not constitute duress. The stipulation provided for the award of all the authority Commercial had requested in its application to this Commission.

Even if the facts were completely in Commercial's favor, Commercial has waived any right to complaint about the fact that it signed the stipulation. It is clear that Commercial has intentionally relinquished a known right, if any it had. The Wyoming Supreme Court has held that a waiver exists awhere one with full knowledge of a material fact does or prepares to do something inconsistent with the existence of a right or of the party's intention to rely on that right. *New Hampshire Fire Insurance Co. of Manchester v. Boler,* 102 P.2d 39 (Wyo. 1940); *Ranger Insurance Co. v. Cage,* 501 P.2d 1255 (Wyo. 1972).

POINT II. COMMERCIAL HAS NOT AND STILL REFUSES TO FOLLOW THE STIPULATION AND ABIDE BY THE ORDER OF THIS COMMISSION.

Commercial admittedly told Industrial after the 1977 hearing that if Industrial did not let Commercial have VHF channels 1 and 9 in Evanston, Commercial would file on some of the other channels, which Industrial operates from Marsh Peak. (T.347) Commercial's demand was contrary to the stipulation that recognized Industrial had previously filed on channels 1 and 9. Thereafter, Commercial not only filed on channels 1 and 9 but has now filed on Industrial's other channels operating on Marsh Peak. (T.546) Mr. Christopherson testified in the present hearing that Commercial is not willing to follow the stipulation. (T.545) Industrial has at all times been willing to follow the stipulation and has only proposed other alternatives of settlement because of Commercial's actions and demand for channels 1 and 9 in Evanston. (T.565-66)

Commercial admits the Commission's order based on the stipulation granted Commercial all the authority requested in its application. (T.272, 358) By Commercial's subsequent actions, it is clear Commercial wanted more than it applied for and more than it was granted in the stipulation and order. Commercial also knew that if Indus-

trial gave up what Commercial demanded, Industrial's existing service in southwestern Wyoming would be severely impaired. In February, 1978, Commercial agreed to a settlement whereby Industrial would withdraw its applications to operate channels 1 and 9 in Evanston if Commercial would not file on the channels Industrial was then using from its Marsh Peak site. (T.350-51) This settlement was designed to completely separate the channels that Commercial and Industrial were using and avoid any potential interference problems in southwestern Wyoming. The agreement was never signed and Commercial is not willing now to sign the agreement. (T.351) Industrial is willing to sign the agreement. (T.571)

POINT III. THIS COMMISSION CAN AND SHOULD IN THE PUBLIC INTEREST REQUIRE EACH OF THE PARTIES TO FURNISH SERVICE ON CERTAIN EXCLUSIVE CHANNELS.

The dispute between Commercial and Industrial will likely be solved only by the occurrence of one of three events: (a) that the parties voluntarily agree on some basis to settle their dispute; (b) that the FCC will rule within a short time; or (c) that the Wyoming Public Service Commission will settle the dispute by its own order.

In regard to the first possibility, it is apparent from past experience, that the parties probably will not be able to settle the matter voluntarily. In the second case, it is unlikely that the FCC will rule within the foreseeable future. All witnesses agreed that any decision by the FCC is probably years away. Therefore, it appears that the difficulty can be expeditiously resolved only by action of the Wyoming Public Service Commission.

Each of the parties is presently operating on five mobile radio channels in southwestern Wyoming. The fastest and least expensive way to insure full interference free service to the public is to prevent the continuing dispute about interference in situations where two persons have authority over the same channels in wide area coverage situations. Thus, although enforcing the Commission's order based on the stipulation would be one solution to the present impasse, the better approach appears to be to require the parties to operate on different channels to avoid all interference problems and require the parties to take such action immediately under the risk of losing Commission authority to operate.

It is the position of Industrial that the Wyoming Public Service Commission has the power to regulate RCC's operating in the State of Wyoming so long as such regulation does not violate the applicable FCC rules in regard to the

procedural granting of channel licenses and the physical operation thereof. The pertinent FCC engineering and legal provisions clearly allow the necessary wide area operation presently in existence in southwestern Wyoming. The Carey Report on which Commercial places a great deal of emphasis, explicitly acknowledges the existence of field operational problems not covered by the suggested formulas. The wide area coverage requirements which are essential to oil field operations in southwestern Wyoming are simply not controlled by or amenable to Carey procedures. The FCC granted power waivers where appropriate. Both Industrial and Commercial are presently operating under such waivers. If the 37 dbu criteria on which Carey is based were applied to southwestern Wyoming, effective oil field communications would be very inadequate if not eliminated. This Commission has previously recognized the need for wide area service.

Section 37-2-112 (Wyo. Stat. 1977) together with other relevant statutes invest the Wyoming Public Service Commission with the powerr to regulate all public utilities in the State of Wyoming. The Wyoming Supreme Court has held that the Commission is authorized to impose just and reasonable conditions on utilities operating under certificates of public convenience and necessity. See *Riverton Valley Electric Ass. v. Pacific Power & Light Co.*, 391 P.2d 489, 499 (Wyo. 1964). If there is a conflict between two utilities operating in the same area, the Commission has the authority to make such orders and prescribe such conditions as the Commission may find just and reasonable in the public interest. See *Dubois Telephone Exchange v. Mt. States Telephone & Telegraph Co.*, 429 P.2d 812, 816 (Wyo. 1967).

The authority of the Wyoming Public Service Commission is similar to and consistent with the authority granted public service commissions in other western states. For example, the Idaho Supreme Court has interpreted the Idaho statutory provisions which are similar to those of

Wyoming to vest the Idaho Public Utilities Commission with power to prescribe necessary rules and regulations for the performance of any service or the furnishing of any commodity supplied by a public utility, and it is the duty of the Commission to assure that adequate service is furnished to the public. *Grever v. Idaho Telephone Co.*, 499 P.2d 1256, 1258 (Ida. 1972). Moreover, public utility commissions have the responsibility to insure that the service or commodity being furnished by the utility will not be wasted or misused and that it will be allocated in such a manner as to provide satisfactory and continuing service to the portion of the public the utility is serving. See *McMullin v. Public Service Comm. of Utah*, 320 P.2d 1107, 1109 (Ut 1958).

The exercise of the above described authority in this case would not infringe on the authority of the FCC. Section 21.31 of the FCC Rules and Regulations in regard to RCC's, Volume 7, March, 1974, provides for a situation where the Commission will consider applications for FCC authority to be mutually exclusive if there is harmful electrical interference causing a material impairment of service to the public. Clearly, such section transcends the narrow limitations urged by Commercial. The above section not only does not prohibit the application of wide area service but endorses the concept of interference free wide area coverage. In addition, the data given in Section 21.503 would require a separation of transmitters greater than the distance between Marsh Peak and Rock Springs, Wyoming. Moreover, subparagraph (b) of said section gives the FCC power to require greater separation than shown by the tables if there are unusual radio wave propagation conditions. This again clearly recognizes the fact of wide area coverage.

The language of the Carey Report itself certainly recognizes that the data contained therein is of limited application and is not applicable to particular field situations. For example, the Introduction to the Carey Report on page 1 states the following:

> Although the system parameters in both directions are important from an operational standpoint, only the reception of a base station by a mobile unit is considered, since this is the controlling factor for assignment purposes.

As was stated previously, for wide area service the sensitivity of the mobile unit to both send and receive messages is a critical factor. If the mobile signal is captured by a competing station, then the communication is effectively destroyed.

The Carey Report itself contradicts Commercial's reliance on Carey procedures in cases of wide area coverage when it states at page 5:

> The problem of calculating the cumulative effects of two or more interfering signals was afforded extensive consideration by the VHF Ad Hoc Committee; however, the report of their findings was by no means conclusive as to the most acceptable method to be used and was not fully endorsed by the Committee.

The Conclusion of the Carey Report on page 5 refutes Commercial's argument that Carey procedures ought to apply to the wide area coverage circumstances existing in southwestern Wyoming. The report concludes:

> Under average terrain conditions, the methods set forth in this report will facilitate the calculation of service areas in the Domestic Public Land Mobile Radio Service. However, it should be pointed out that the use of average propagation curves for prediction on a point to point basis will result in standard deviations in the order of 8DB at VHF and 12DB at UHF. *Individual deviations for specific paths in both frequency ranges may be much greater.* (Emphasis added.)

The power waivers obtained by both Commercial and Industrial in southwestern Wyoming are just such individual deviations to accommodate specific radio paths which necessarily extend transmitting ranges much further. The waivers allow the extended mobility and reduce the cost to the public by requiring fewer facilities.

The Carey Report by its own terms as well as FCC rules and regulations and Wyoming law, authorize this Commission to regulate, and even require, wide area radio common carrier service in southwestern Wyoming so that the optimum in interference free communications may be provided to the public.

As was proposed above, it appears that the best way to obtain radio common carrier service for the public in southwestern Wyoming on an interference free basis, is for this Commission to take action within its powers and require the parties to provide service forthwith. Industrial believes that the best solution under all of the circumstances of this case would be to implement the contract drawn up by Jeremiah Courtney in February, 1978, for the signatures of Commercial and Industrial. This would achieve inteference free service to the public in southwestern Wyoming and would allow both parties to extend their service, if required, into the UHF range, inasmuch as all VHF channels are presently in service in the area. The Commission could enforce its order by revoking the certificate of any party who failed to comply with the Commission's order within a fixed period. The order would necessarily include the requirement that the parties settle their disputes before the FCC and require that Industrial withdraw its application for channels 1 and 9 in Evanston. The Commission might also consider the limitation of further applications by the parties to the FCC for additional UHF channels except on some equitable basis which would insure interference free service to the public. Commercial's own expert believes the Commission has the power to invoke the above solution. (T.651)

DATED this 25th day of April, 1979.

Respectfully submitted,
WATKINS & FABER
Walter P. Faber, Jr.
Michael A. Neider
Attorney for David R. Williams
606 Newhouse Building
Salt Lake City, Utah 84111

By Michael A. Neider

WARD A. WHITE
Co-Counsel for David R. Williams
1600 Van Lennen Avenue
Cheyenne, Wyoming 82001

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Closing Argument of Industrial Communications, postage prepaid, this 25th day of April, 1979, to David H. Carmichael, Attorney for Commercial Communications, 2424 Pioneer Avenue, Suite 403, Cheyenne, Wyoming 82001.

Michael A. Neider

Opposition

Office-Supreme Court, U.S.
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CLERK

No. 81-262

IN THE

Supreme Court of the United States

October Term, 1981

DAVID R. WILLIAMS d/b/a
INDUSTRIAL COMMUNICATIONS,
Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF WYOMING
and COMMERCIAL COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORIARI
TO THE SUPREME COURT OF WYOMING

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Steven F. Freudenthal
Attorney General
State of Wyoming

Lawrence J. Wolfe
Assistant Attorney General
State of Wyoming

Steven R. Shanahan
Counsel of Record
Senior Assistant Attorney
General, State of Wyoming

123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

ATTORNEYS FOR RESPONDENT
WYOMING PUBLIC SERVICE COMMISSION

David H. Carmichael
Carmichael, McNiff & Patton
2424 Pioneer Avenue - Suite 403
Cheyenne, WY 82001
(307) 635-4111

ATTORNEY FOR RESPONDENT
COMMERICAL COMMUNICATIONS, INC.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the regulatory action taken by the Wyoming Public Service Commission and affirmed by the Wyoming Supreme Court is barred by the doctrine of federal preemption.

2. Whether the orders of the Wyoming Public Service Commission as affirmed by the Wyoming Supreme Court deprived Petitioner of any substantial federal rights.

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No. 81-262

IN THE

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DAVID R. WILLIAMS d/b/a
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vs.

PUBLIC SERVICE COMMISSION OF WYOMING
and COMMERICAL COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORIARI
TO THE SUPREME COURT OF WYOMING

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

The Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Wyoming Supreme Court in this case.

OPINION BELOW

The opinion of the Wyoming Supreme Court and the Order Denying Rehearing appear in Appendix A of the Petition and are reported at 626 P.2d 564, Rehearing Denied ____P.2d ____(Wyo. 1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the Interstate Commerce Clause, Artilce I, § 8, Clause 3, and the Supremacy Clause, Article VI, Clause 2. These constitutional provisions appear in Appendix C of the Petition for Certioriari. The federal statute applicable to this case is the Communications Act of 1934, 47 U.S.C. § 151 *et. seq.* The pertinent sections of the Act are 47 U.S.C. §§ 152(b)(1) and 221(b) and 47 U.S.C. § 301. 47 U.S.C. §§ 152(b)(1) and 221(b) appear in Appendix A of this Brief and 47 U.S.C. § 301 appears in Appendix C of the Petition.

STATEMENT OF THE CASE

This is a controversy between two public utilities involved in furnishing radio telephone service to the public in the State of Wyoming.

Before any person or company may engage in the radio telephone business in the State of Wyoming, a Certificate of Convenience and Necessity must be obtained from the Wyoming Public Service Commission (hereinafter "PSC") and application must be successfully made to the Federal Communications Commission (hereinafter "FCC") for the assignment of a specific radio frequency or frequencies.

In January of 1977 Respondent Commerical Communications, Inc. (hereinafter "Commerical") applied to the PSC for authority to provide radio telephone service to the cities of Rawlins and Evanston, Wyoming located in Carbon and Uinta Counties respectively.

In February of 1977 Petitioner Industrial Communications, Inc. (hereinafter "Industrial") filed its application for authority to provide radio telephone service to all or parts of Lincoln, Uinta and Sweetwater Counties, Wyoming.

Various other parties filed protests and requests to intervene in the proceedings initiated by Commercial and Industrial.

All matters were consolidated for hearing before the PSC on August 29, 1977 and after several days of hearings, a Stipulation was entered into on September 1, 1977 by all of the parties before the PSC. The Stipulation and PSC Order dated November 29, 1977 approving the Stipulation appear in Appendix D of the Petition.

The Stipulation provided in pertinent part that Commerical and Industrial were to work out a solution to the use of channels 1 and 9 in Evanston, Wyoming. (Paragraph (e) Appendix D-18 of Petition)

On August 2, 1978, Commerical filed a "Formal Complaint and Petition for Cancellation of Certificate of Public Convenience and Necessity and Other Relief", which alleged that Industrial had refused to cooperate with Commerical in bringing service to the Evanston and Rawlins, Wyoming areas; that Industrial had blocked and obstructed Commerical's efforts to bring service to Rawlins and Evanston, Wyoming; and, that the Stipulation of September 1, 1977 had been signed by Commerical as a result of coercion, threats, and business duress of David R. Williams, the principal of Industrial. Commerical asked that the PSC enter an Order cancelling and voiding the Certificate of Public Convenience and Necessity issued to Industrial on November 29, 1977.

On August 29, 1978, Industrial filed its Answer and Counterpetition, in which it alleged that Commercial, and not Industrial, had refused to cooperate in bringing radio telephone service to the areas in Wyoming.

The matter proceeded to hearing, and resulted in an Order entered by the PSC on the 18th day of May, 1979. In its Order the PSC found that there was no basis for Commercial's assertion of business compulsion and duress. The PSC

redefined the Certificate of Convenience and Necessity for each of the parties. The PSC Order went on to provide that Commercial and Industrial shall operate on different channels:

> (16)(c) . . . the Commission finds that Commercial should be entitled to operate on VHF Channels 1 and 9 in the Rock Springs, Green River, Evanston and LaBarge areas, and that Industrial should continue operation on its existing Channels 3, 5, 7, 11 and 13.
> (Appendix B-13 of Petition)

Both parties filed a Petition for Rehearing and Clarification. On August 29, 1979, the PSC entered its "Order Denying Petition for Rehearing." This Order further explained the reasons for the channel determinations and stated that the PSC had not ordered Industrial to withdraw its applications to the FCC for channels 1 and 9.

It must be noted that the 1978 agreement referred to in Petitioner's Statement of the Case (Petition at 4) was never entered into by the parties. Although an agreement was proposed, it was never consummated and it has no effect upon the facts or record in the case.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE WYOMING SUPREME COURT FULLY CONSIDERED ALL ISSUES IN THIS CASE AND CORRECTLY RULED THAT THE ORDER OF THE WYOMING PUBLIC SERVICE COMMISSION DID NOT INFRINGE UPON FCC JURISDICTION.

The sole issue in this case that involves a substantial federal question is whether the Orders of the Wyoming Public

Service Commission infringed upon jurisdiction vested in the Federal Communications Commission.

This case involves no important issues of federal-state regulatory conflict upon which this Court should rule. The Petitioner has failed to present any reasons to justify a grant of certiorari. Industrial has made a bald, unsupported assertion that the orders of the Wyoming Public Service Commission infringe upon jurisdiction vested with the FCC. Respondents believe that the facts do not substantiate the Petitioner's contention. Additionally, the Petitioner has failed to analyze the federal preemption issue in accordance with the tests established by this Court.

In contrast, the Wyoming Supreme Court fully analyzed the issue and determined that the Orders of the PSC did not infringe upon authority vested exclusively in the FCC. The decision of the Wyoming Supreme Court is well reasoned and is supported by decisions of other state and federal courts and by the federal statutes governing the jurisdiction of the FCC.

The Wyoming Supreme Court addressed directly the issue of whether the conditions attached by the PSC Orders were barred under the doctrine of federal preemption. *Appeal of Williams*, 626 P.2d 564, 572 (Wyo. 1981). In considering the issue of federal pre-emption, this Court has recently held that "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject permits no other conclusion, or that the Congress has unmistakably so ordained' ". *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile*, ____ U.S. ____, 67 L.Ed.2d 258, 265, 101 S.Ct. ____ (1981), citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 140, 10 L.Ed.2d 248, 83 S. Ct. 210 (1963). The Wyoming Supreme Court analyzed the preemption issue under the guidelines set forth in *Florida Lime & Avocado Growers v. Paul*. On each of the three tests the Wyoming Supreme Court concluded as follows.

A. IT IS POSSIBLE FOR ONE ENGAGED IN INTERSTATE COMMERCE TO COMPLY WITH BOTH THE FEDERAL AND STATE REGULATIONS.

The FCC and the Public Service Commission have independent grants of authority based on federal and state law respectively. The Wyoming Supreme Court correctly concluded that it is possible for Petitioner to comply with both federal and state regulations. See, *ATS Mobile Telephone, Inc. v. Curtin Call Communications, Inc.*, 194 Neb. 404, 232 N.W. 2d 248 (1975), overruled on other grounds, *ATS Mobile Telephone, Inc. v. General Communications Company, Inc.*, 204 Neb. 141, 282 N.W.2d 16 (1979).

B. NO REASON EXISTS FOR FEDERALLY IMPOSED UNIFORMITY IN THE REGULATION OF RADIO COMMON CARRIERS.

The Wyoming Supreme Court recognized that the provisions of radio common carrier (RCC) service is primarily local in nature and there is no need for national uniformity. See, *ATS Mobile Telephone v. Curtin Call Communications, Inc.*, supra, 232 N.W.2d at 253; *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 432, 10 L.Ed.2d 983, 989, 83 S.Ct. 1759 (1963). Many decisions of the FCC, the federal and state courts also recognize that the Federal Communications Act sought to preserve and foster state regulation of interstate communication. See, *Fields v. Davis*, 31 Or. App. 607, 571 P.2d 511, 517 (1977); *Radio Telephone Communications, Inc. v. Southeastern Tel. Co.*, 170 So.2d 577 (Fla. 1965); *T.V. Pix, Inc. v. Taylor*, 304 F.Supp. 459 (D.Nev.), aff'd. 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746 (1970). The need for national uniformity in the regulation of RCC's is not present.

C. CONGRESS HAS EXPRESSED AN INTENT NOT TO PREEMPT STATE REGULATION OF MOBILE RADIO COMMON CARRIERS.

The intent of Congress not to preempt state regulation of radio common carriers is found in 47 U.S.C. §§ 152(b)(1) and 221(b) set forth in Appendix A of this Brief. The language in § 221(b) "is a clear statement that Congress did not intend to preempt state regulation of mobile common carriers through the passage of the Federal Communications Act." *Fields v. Davis*, 31 Or. App. 607, 571 P.2d 511, 516 (1977). See also, *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So.2d 577 (Fla. 1965). The FCC itself recognizes that states are not preempted from asserting regulatory jurisdiction over radio common carriers such as the Petitioner. See, *In re United Telephone Co. of Ohio*, 26 FCC 2d 417 (1970); *In re ATS Mobile Telephone, Inc.*, 35 FCC 2d 443, 457 (1972).

The decision of the Wyoming Supreme Court is in accord with established precedent in state and federal courts and with interpretations of the Federal Communications Act by the FCC. There is no reason to grant certioriari to review this case.

II. PETITIONER'S CLAIM THAT HE WAS DEPRIVED OF SUBSTANTIAL FEDERAL RIGHTS IS UNSUPPORTED BY THE FACTS AND WITHOUT MERIT.

The Petitioner claims that the Orders of the PSC have required it to abandon and withdraw its FCC applications for frequencies 1 and 9. (Petition at 6.) However, a careful reading of the record reveals conclusively that the PSC's Orders do not require the Petitioner to give up any applications before the FCC. In the PSC's "Order Denying Petition for Rehearing" (Appendix B-17 of Petition) entered on August 29, 1979 the Public Service Commission held that its order did not require the abandonment of any FCC applications:

The Commission acknowledges the language con-

tained in paragraphs 16(c) [of the May 18, 1979 Order, Appendix B-1] may be somewhat confusing and that further explanation is prudent. The Order presently under consideration would appear to grant Commercial exclusive use of channels 1 and 9 in southwestern Wyoming, action which is clearly contradictory to the nonexclusive intent stated previously for primary and secondary service areas. The specific provision under consideration states that, "The Commission finds that Commercial should be entitled to operate on VHF Channel 1 and 9 in the Rock Springs, Green River, Evanston and LaBarge areas, and that Industrial should continue operations on its existing Channels, 3, 5, 7, 11 and 13." **In keeping with the nonexclusive nature of certificate grants made by this Commission pertaining to RCC operations, the foregoing language should not be construed to require or compel the abandonment of any FCC action concerning channel utilization in southwestern Wyoming.** (Emphasis added) (Appendix B-22 of Petition).

The Petitioner's argument that it has been deprived of substantial federal rights is quite simply unfounded. The Commission has not ordered the Petitioner to abandon its applications to the FCC. The Petitioner's argument on this issue is without merit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certioriari should be denied.

Respectfully submitted,

Steven F. Freudenthal
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

Lawrence J. Wolfe
Assistant Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7899

Steven R. Shanahan
Counsel of Record
Senior Assistant Attorney
General, State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6295

ATTORNEYS FOR RESPONDENT
WYOMING PUBLIC SERVICE COMMISSION

David H. Carmichael
Carmichael, McNiff & Patton
2424 Pioneer Avenue - Suite 403
Cheyenne, WY 82001
(307) 635-4111

ATTORNEY FOR RESPONDENT
COMMERCIAL COMMUNICATIONS, INC.

September 4, 1981

APPENDIX A

STATUTES

47 U.S.C. 151 *et. seq.*

Subchapter I - General Provisions

47 U.S.C. § 152(b)(1)

> Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . .

Subchapter II - Common Carriers

47 U.S.C. § 221(b)

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

Petitioner's Reply Brief

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No. 81-262

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OCTOBER TERM, 1981

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INDUSTRIAL COMMUNICATIONS,
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vs.

PUBLIC SERVICE COMMISSION OF WYOMING,
and COMMERCIAL COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF WYOMING

REPLY BRIEF OF PETITIONER

WALTER P. FABER, JR. and
MICHAEL A. NEIDER, OF
WATKINS & FABER
2102 East 3300 South
Salt Lake City, Utah 84109
Telephone: (801) 486-5634

Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

Petitioner respectfully submits his Reply Brief to the Joint Brief of Respondents.

DISCUSSION

Respondents argue in their Joint Brief that there is no federal preemption of the RCC matters considered by the Wyoming Public Service Commission, but they do not directly address the question of the channel allocation ordered by the

Commission. Respondents conclude their argument with the Wyoming Commission's statement that its order "should not be construed to require or compel the abandonment of any FCC action concerning channel utilization in southwestern Wyoming," presumably, to show that, in any case, the Wyoming Commission has not deprived Petitioner of federal rights.

The problem with Respondents' argument is that the Wyoming Commission also stated that if its order making the particular allocation was not obeyed then Petitioner's authority to operate in Wyoming would be revoked. Clearly, if Petitioner's right to operate in Wyoming were revoked under such circumstances, the Wyoming Commission would have exercised complete dominion over the allocation of RCC radio frequencies in Wyoming and rendered meaningless any contrary frequency grant by the FCC. Respondents' Joint Brief amply demonstrates the validity of the issues raised by Petitioner and the need for granting the Writ of Certiorari.

Respectfully submitted,
Walter P. Faber, Jr. and
Michael A. Neider, of
WATKINS & FABER
2102 East 3300 South
Salt Lake City, UT 84109
Telephone: (801) 486-5634
Counsel for Petitioner

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